No. 05-933

In The
Supreme Court of the United States

EL PASO PROPERTIES, INC.,

Petitioner,

v.

SIERRA CLUB AND
MINERAL POLICY CENTER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Roosevelt Tunnel is a six-mile long drainage tunnel constructed a century ago to drain groundwater in the Cripple Creek mining district in central Colorado. The Roosevelt Tunnel portal is adjacent to Cripple Creek, a tributary of the Arkansas River. Petitioner El Paso Properties, Inc., formerly El Paso Gold Mines, Inc. (El Paso), owns property including an inactive gold mine and a collapsed mine shaft which intersects the Roosevelt Tunnel over 1,200 feet below ground at a location approximately two and one-half miles from the tunnel portal. The Roosevelt Tunnel underlies and connects to many properties in the Cripple Creek mining district, including a portion of Colorado's largest active gold mine. El Paso has never conducted mining or other operations on its property, nor does it hold any interest in the Roosevelt Tunnel.

In a new and expansive interpretation of the Clean Water Act (CWA), the Tenth Circuit held that simple property ownership may create liability under CWA Section 402, which requires a permit for "the discharge of any pollutant by any person" to navigable waters from a point source. Shifting the CWA's focus from the active conduct suggested by the term "discharge" to mere property ownership, the Tenth Circuit concluded metaphorically that "if you own the leaky 'faucet,' you are responsible for its 'drips.'" The Tenth Circuit's ruling creates potential CWA liability for a new and very large class of property owners, including many governments, without regard to whether the landowner engaged in any affirmative conduct affecting water quality.

QUESTIONS PRESENTED – Continued

The questions presented, which are of great national importance, are:

1. Whether mere ownership of property, abetted by the hydrologic cycle but without any past or present affirmative act by the owner, constitutes the "discharge" of a pollutant to navigable waters from a point source, thereby subjecting a passive property owner to CWA Section 402 liability.

2. Whether a passive landowner that has never conducted any operations on its property can presently be in "continuous or intermittent violation" of the CWA [*Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 64 (1987)] for purposes of federal subject matter jurisdiction under the CWA Section 505(a).

RULES 29.6 AND 14.1 STATEMENT

Petitioner, El Paso Properties, Inc., formerly known as El Paso Gold Mines, Inc., formally changed its corporate name on September 28, 2004 by filing the proper paperwork with the Colorado Secretary of State. El Paso Properties, Inc. is a privately held corporation organized and operating in good standing under the laws of the State of Colorado. Petitioner has no parent corporation and no publicly held company owns 10% or more of the corporation's stock.

Respondents are the non-profit environmental groups Sierra Club and Mineral Policy Center.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR WRIT OF CERTIORARI

Petitioner El Paso Properties, Inc. (El Paso) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The final opinion of the court of appeals and order granting Respondents' petition for panel rehearing (App., *infra*, 1-34 & 102-103) will not be published in the Federal Reporter. The original opinion of the court of appeals is reported at 421 F.3d 1133 (10th Cir. 2005). The opinion of the district court granting summary judgment (App., *infra*, 35-70) is not reported. The final judgments entered by the district court (App., *infra*, 71-74) are not reported. The opinion of the district court denying El Paso's motion to dismiss or stay the proceedings under the doctrines of abstention and primary jurisdiction is reported at 198 F. Supp. 2d 1265 (D. Colo. 2002). The opinion of the Colorado Administrative Law Judge (App., *infra*, 75-101) is not reported.

JURISDICTION

The opinion of the court of appeals originally entered on August 24, 2005. Respondents' motion for panel rehearing and rehearing *en banc* was granted on October 21, 2005 for the sole purpose of correcting dates. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutory and regulatory provisions pertinent to this case are set forth at App., *infra*, 104-105.

STATEMENT

There are two important public policy questions presented in this case: (1) whether passive owners of abandoned mine properties may be subject to liability under the Clean Water Act; and (2) whether Clean Water Act citizen suits may be brought against such landowners.

A. Undisputed Relevant Facts

El Paso purchased about 100 acres of property and mineral rights in the Cripple Creek mining district of Colorado in 1968, four years prior to passage of the Clean Water Act (CWA). The mining district contains many underground tunnels, shafts, drains, adits, laterals, and mine workings. El Paso's property includes portions of an old abandoned mine as well as a collapsed mine shaft known as the El Paso shaft. A series of underground mine workings connect the El Paso mine and shaft to other mining properties in the vicinity.

The Roosevelt Tunnel is a six-mile long drainage tunnel that was constructed by a consortium of mining companies in the first decade of the twentieth century to drain groundwater in the mining district. Some of El Paso's property overlies a portion of the Roosevelt Tunnel, although the Tunnel's portal is located approximately two

and one-half miles down gradient from El Paso's property. Multiple properties overlie, connect to, and are drained by the Roosevelt Tunnel.

El Paso and its shareholders did not construct the El Paso shaft, the El Paso Mine or the Roosevelt Tunnel. El Paso has never conducted mining operations or held a mining or exploration permit. El Paso's sole asset is the property that is the subject of this litigation. Respondents allege in this CWA citizen suit that El Paso is discharging pollutants from the Roosevelt Tunnel portal into navigable waters without a permit. Respondents seek to prove that, as a result of the natural hydrologic cycle, small amounts of zinc and manganese are transported from the El Paso shaft into the Roosevelt Tunnel and thence into navigable waters from the Roosevelt Tunnel portal.

B. The Statutory and Regulatory Scheme

Section 402 of the CWA, 33 U.S.C. § 1342, establishes a national pollutant discharge elimination system (NPDES) and directs the Environmental Protection Agency (EPA) to issue permits for the discharge of pollutants. Section 404 of the CWA, 33 U.S.C. § 1344, establishes a permitting program for the discharge of dredged or fill material, which is generally administered by the U.S. Army Corps of Engineers. States are authorized to assume primary responsibility for administering the NPDES program under the oversight of the EPA. Colorado has established an EPA-approved NPDES program. COLO. REV. STAT. §§ 25-8-501 *et seq.* Under the Colorado program, the Water Quality Control Division (WQCD) of the Colorado Department of

Public Health and Environment has primary responsibility for permitting decisions and enforcement.

Section 301(a) of the CWA, 33 U.S.C. § 1311(a), makes unlawful "the discharge of any pollutant by any person" unless the discharger has obtained a valid permit under Section 402 or Section 404. The phrase "discharge of a pollutant" in § 1311(a) is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12); *see also* 40 C.F.R. § 122.2; 33 C.F.R. § 323.2(d)(1) & (f). Therefore, a "discharge of a pollutant" occurs when five elements exist: "(1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982).

Section 505(a)(1) of the CWA, 33 U.S.C. § 1365(a)(1), grants citizens, acting as private attorneys general, the right to bring civil actions against any person "alleged to be in violation of" the discharge permit requirement. This Court has interpreted this language to preclude private actions based on wholly past violations. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 57 (1987). According to this Court, "[t]he bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action." *Id.* at 60. The statute requires a citizen to "allege a state of either continuous or intermittent violation – that is, a reasonable likelihood that a past polluter will continue to pollute in the future." *Id.* at 57.

C. Respondents' Citizen Suit

On November 5, 2001, Respondents commenced a citizen suit against El Paso for discharges of pollutants from the portal of the Roosevelt Tunnel into navigable waters. The parties herein filed cross-motions for summary judgment on September 20, 2002 Without hearing any testimony, the district court entered summary judgment and ordered El Paso to: (1) apply for a discharge permit pursuant to the CWA; (2) pay $94,900 in civil penalties to the United States Treasury; and (3) reimburse Respondents for their attorney fees and costs. App., *infra*, 35-74.

D. The Parallel Federal and State Proceedings

Although there is but one flow of water from the Roosevelt Tunnel portal into Cripple Creek, prior to suing El Paso, the Respondents herein also sued the Cripple Creek & Victor Gold Mining Company (CC&V) for the same alleged violation under the CWA citizen suit provision. *See* Civil Action No. 00-MK-2325 (D. Colo.); App., *infra*, 4 n.1. Respondents' case against CC&V is scheduled to go to trial on February 13, 2006.

On July 25, 2002, the WQCD initiated administrative enforcement proceedings under state law alleging that El Paso's "ongoing discharge of pollutants into the Roosevelt Tunnel, and from the Roosevelt Tunnel into Cripple Creek constitutes an unauthorized discharge of pollutants from a point source(s) into state waters." On April 21, 2003, a state Administrative Law Judge (ALJ) issued an initial decision in the WQCD case after hearing four days of testimony. App., *infra*, 75-101. The ALJ found "as fact that there is insufficient evidence to find that [El Paso] is

responsible for the zinc and manganese in the water at the portal." App., *infra*, 93. The ALJ concluded that the WQCD "failed to prove that the zinc and manganese in the water coming out of the Roosevelt Tunnel portal has its origin in the El Paso Mine owned by [El Paso]." App., *infra*, 96.[1] The WQCD administrative enforcement proceedings are currently stayed by stipulation of the parties pending this Court's action on this petition.

E. The Tenth Circuit's Decision

The Court of Appeals for the Tenth Circuit reversed the district court's summary judgment order after finding that there are disputed issues of material fact regarding the hydrological connection between El Paso's property and navigable waters. App., *infra*, 24-34. The Tenth Circuit affirmed, however, the district court's rulings with respect to the two legal issues presented in this case. App., *infra*, 10-24.

To date, only the Seventh Circuit Court of Appeals has directly examined the extent to which passive landowners may have liability for discharging without a permit under the CWA. *Froebel v. Meyer*, 217 F.3d 928 (7th Cir. 2000), *cert. denied*, 531 U.S. 1075 (2001) (mere ownership of property cannot give rise to CWA liability). The Tenth Circuit distinguished the *Froebel* holding on the basis that the decision considered only Section 404 of the CWA (discharge of dredged or fill material) and not Section 402

[1] The ALJ also found that El Paso was liable under *state law* for discharging pollutants from the base of the El Paso shaft into *groundwater* flowing in the Roosevelt Tunnel, which he determined constituted waters of the state under the Colorado Water Quality Control Act (WQCA). App., *infra*, 96-97.

(point source discharge). Instead, the Tenth Circuit adopted the reasoning of the Fifth Circuit as set forth in *dicta* in the case of *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980), holding that any person who owns a point source through which pollutants flow is liable for the discharge of those pollutants under the CWA.

The Tenth Circuit held that a landowner can be liable for the discharge of pollutants occurring on its land even if (a) it purchased its property before passage of the CWA; and (b) it committed no affirmative act related to the alleged discharge. According to the Tenth Circuit, "if you own the leaky 'faucet,' you are responsible for its 'drips.'" App., *infra*, 23. The Tenth Circuit's ruling is legally erroneous, conflicts with precedent from the Seventh Circuit and would undermine current Congressional efforts to address problems stemming from abandoned mine sites. By enacting the CWA, Congress did not intend to require passive landowners to obtain discharge permits for naturally occurring elements collected in groundwater flowing through their property. The Tenth Circuit's ruling that such flows constitute the "discharge" of pollutants is inconsistent with the plain language, legislative history and purposes of the CWA.

Even if the CWA does impose permitting obligations against passive landowners, however, Congress did not intend to authorize retroactive citizen suits against owners of abandoned mine properties. Section 505(a)(1) of the CWA grants citizens the right to bring civil actions against any person "alleged to be in violation of" effluent standards or limitations. In 1987, this Court held that Congress, by using the present tense phrase "in violation," did not intend to permit citizen suits based on "wholly past violations" of the CWA. *Gwaltney*, 484 U.S. at 49. Instead,

this Court reasoned that because the language and structure of the citizen suit provision is "primarily forward-looking" or preventative, *id.* at 59, the most natural reading of Section 505(a)(1) requires "citizen-plaintiffs [to] allege a state of either continuous or intermittent violation – that is, a reasonable likelihood that a past polluter will continue to pollute in the future." *Id.* at 57.

In this case, the Tenth Circuit observed that "[i]f the Plaintiffs complained only that the pollutants migrated from surface waste piles through the ground to the tunnel, or seeped into the tunnel from naturally occurring mineral deposits in the ground, El Paso's argument as a passive landowner would have considerable force." App., *infra*, 14. However, the court of appeals distinguished a line of cases from other circuits holding that the migration of pollutants from prior discharges are wholly past on the basis that Respondents have argued that El Paso's property contains "a man-made point source that delivers pollutants and continues to discharge them into the Roosevelt Tunnel." *Id.*

This case amply demonstrates that the citizen suit is an inappropriate mechanism for adjudicating liability for alleged point source discharges that have multiple sources. In such situations, the use of citizen suits may lead to inconsistent rulings in multiple administrative and judicial forums. The Respondents herein are pursuing two separate citizen suits against multiple parties for a single flow of water from the Roosevelt Tunnel portal. There are also state enforcement proceedings pending with respect to the Roosevelt Tunnel discharge, and factual findings made thus far in the federal and state proceedings are in direct conflict. Under these circumstances, the state regulatory agency charged with implementing the NPDES

permitting program should have sole enforcement authority exclusive to the role of citizen suits.

Given (1) the contradictory holdings of the Seventh and Tenth Circuits regarding passive property owner liability; (2) the Tenth Circuit's failure to apply the plain language of the CWA; (3) the large number of potentially affected abandoned mining properties in the United States; and (4) the potential for inconsistent rulings arising from the use of citizen suits seeking to impose liability for drainage from abandoned mining properties, the Tenth Circuit's holdings herein merit review by this Court.

REASONS FOR GRANTING THE PETITION

This Court should grant review because the circuits are divided over the fundamental scope of the NPDES program. The Tenth Circuit's decision misinterprets the "discharge" requirement of the Clean Water Act, creating expansive, intrusive and overreaching federal regulatory jurisdiction over the mere ownership of land. The panel's decision ignores congressional intent, eviscerates the CWA's jurisdictional requirements, seriously infringes upon prerogatives reserved to states in our system of federalism, and subjects El Paso to potential liability for pollutants allegedly added to navigable waters as a result of conduct of others that pre-dates both the passage of the CWA and El Paso's ownership of its property. In cases where a single point source discharge is alleged to have multiple sources, the Tenth Circuit's interpretation of law also creates a continuing risk of inconsistent rulings in separate federal and state administrative and judicial proceedings. At a minimum, this Court should clarify that

citizen suits may not be brought based solely upon discharges from abandoned mining shafts and drainage facilities whose construction and acquisition pre-dates passage of the CWA.

I. THE COURTS OF APPEAL ARE IN CONFLICT REGARDING PASSIVE LANDOWNER LIABILITY FOR DISCHARGES UNDER THE CLEAN WATER ACT.

The CWA prohibits the discharge of any pollutant from a point source by any person unless authorized by permit. 33 U.S.C. § 1311(a). The phrase "discharge of a pollutant" in Section 1311(a) is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The CWA does not define "addition" and its legislative history is silent on the meaning of this term. *See*, *Gorsuch*, 693 F.2d at 175. El Paso believes that Congress did not intend to create CWA point source liability for defendants that merely own property without having conducted any activity affecting water quality. Had it intended to require permits of wholly passive property owners, Congress would have prohibited the "ownership of property, without a permit, which contains a point source which adds pollutants to navigable waters," but it did not use this language in the CWA. El Paso believes that it is not discharging pollutants to navigable waters because it has not engaged in any affirmative conduct to cause an addition of pollutants to navigable waters.

Federal courts have held that many types of conduct may constitute discharging from a point source. *See*, *e.g.*, *Romero-Barcelo v. Brown*, 478 F. Supp. 646, 664 (D.P.R. 1979), *rev'd on other grounds*, 643 F.2d 835 (1st Cir. 1981), *aff'd sub nom. Weinberger v. Romero-Barcelo*, 456 U.S. 305

(1982) (aircraft from which the release or firing of ordnance into the water is a point source); *Avonyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983) (bulldozers and backhoes constitute point sources); *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995) (manure spreader which distributed manure in field deemed a point source); *United States v. West Indies Transp., Inc.*, 127 F.3d 299, 308 (3rd Cir. 1997), *cert. denied*, 522 U.S. 1052 (1998) (barge from which cement blocks were dumped and paint chips from sandblasting were projected is a point source); *Stone v. Naperville Park Dist.*, 38 F. Supp. 2d 651, 655 (D. Ill. 1999) (shooting range where lead shot and clay targets land in the water is a point source). However, only one circuit court of appeals other than the Tenth Circuit has directly addressed the question of whether the CWA imposes liability based upon mere ownership of property. *Froebel v. Meyer*, 217 F.3d 928 (7th Cir. 2000), *cert. denied*, 531 U.S. 1075 (2001). Except for the Tenth Circuit's decision in this case, every reported case imposing CWA permit liability has found that the discharge resulted from some affirmative conduct by the defendant.

The Tenth Circuit based its ruling on a Fifth Circuit holding set forth in *dicta* in the case of *Sierra Club v. Abston Constr. Co.* In *Abston*, the Sierra Club brought a CWA citizen suit against a consortium of coal strip miners. During strip mining, the overburden is removed, exposing coal that is close to the land surface, and then deposited into "spoil piles" that are highly erodible. *Abston*, 620 F.2d at 43. The Sierra Club alleged that the mining companies were required to obtain point source discharge permits for

runoff from the spoil piles and sediment basin overflows. *Id.* The district court dismissed the Sierra Club's point source discharge claim, holding that any pollution had resulted from natural erosion and rainwater runoff and not "from any affirmative act of discharge by the defendants." *Id.*

On appeal, the Fifth Circuit reversed and remanded the order of summary judgment for the reason that the trial court had failed "to consider fully the effect the miners' activity has on the 'natural' drainage." *Id.* at 44. The *Abston* defendants argued that the discharge of pollutants through ditches and gullies were not point source discharges, "even though the pollutant and the base material upon which the erosion could take place to make gullies was created by the mine operation, and even though the miners' efforts may have permitted the rainwater to flow more easily into a natural ditch leading to the waterway." *Id.* However, the Fifth Circuit adopted the view of the United States, participating as *amicus curiae*, that the *activity* of collecting and channeling surface runoff constitutes a point source discharge.[3] *Id.* at 44-45. Under this view, simple erosion resulting in discharge would not constitute a point source "absent some effort to change the surface, to direct the waterflow or otherwise impede its progress." *Id.* at 45.

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[3] The EPA subsequently adopted this position in a formal regulation, interpreting "discharge of a pollutant" to encompass "surface runoff which is collected or channelled by man." 40 C.F.R. § 122.2. The EPA regulation also refers to discharges to publicly owned treatment works and "discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works." 40 C.F.R. § 122.2. This regulation does not purport to define the meaning of the term "discharge."

The Fifth Circuit did not reach the question of whether the mere ownership of property, without more, may constitute a point source discharge. The *Abston* defendants affirmatively engaged in activities that created point source discharges, including the excavation of sediment basins and "the collection, and subsequent percolation, of surface waters in the pits themselves." *Id.* Nonetheless, the Fifth Circuit observed in *dicta* that "[n]othing in the Act relieves miners from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water." *Id.* According to the Fifth Circuit "[c]onveyances of pollution formed either as a result of natural erosion or by material means, and which constitute a component of a mine drainage system, may fit the statutory definition and thereby subject the operators to liability under the Act." *Id.* The Fifth Circuit remanded the *Abston* case to the district court for additional findings "necessary to determine the precise nature of spoil basins constructed by defendant." *Id.* at 47.

By contrast, the flows at issue in this case are not surface runoff and El Paso engaged in no activity to collect or channel such flows. It is undisputed that the activities of constructing the El Paso shaft and Roosevelt Tunnel occurred long before El Paso purchased its property in 1968.

The facts of this case are more akin to those presented in *Froebel v. Meyer*. *Froebel* involved a citizen suit against the state of Wisconsin and Waukesha County under Sections 402 and 404 of the CWA for discharging pollutants and dredged or fill material into navigable waters without a permit. *Froebel*, 217 F.3d at 932. After the state

of Wisconsin removed a dam built in 1850, the *Froebel* plaintiffs claimed that water passing through the opening where the dam was formerly located would scour silt and sediment and redeposit it downstream. *Id.* at 931-32. Waukesha County did not participate in the dam removal but simply owned the property on which the dam had been located when the plaintiff sued. *Id.* at 934 (Waukesha County "is a party to this case only because it owns the land on which Funk's Dam used to sit."). The district court granted the County's motions to dismiss for failure to state a claim. *Froebel v. Meyer*, 13 F. Supp. 2d 843, 845 (E.D. Wis. 1998).

On appeal, the Seventh Circuit concluded that, in the absence of some active conduct, Waukesha County could not be liable for merely owning property through which water flowed. 217 F.3d at 937-38. According to the court, "there is nothing in either the regulations or the case law interpreting Section 404 that indicates that a landowner can fall within the permit requirement for a 'discharge' by doing absolutely nothing at all." *Id.* at 938. The court noted that "[t]he reference to 'addition' and 'redeposit' strongly suggest that a Section 404 permit is required only when the party allegedly needing a permit takes some action, rather than doing nothing whatsoever (as Waukesha County has done here)." *Id.* The *Froebel* court concluded that the plaintiffs' interpretation of the CWA defied common sense because it "would essentially require Waukesha County to seek a permit to do nothing but continue to own the land." *Id.* at 939. The Seventh Circuit's reasoning has been cited as authority by several district courts. *See, e.g., Jones v. E.R. Snell Contractor, Inc.*, 333 F. Supp. 2d 1344, 1348 (N.D. Ga. 2004) (the CWA "requires active conduct in order to impose liability in a

citizen suit."); *North Carolina Shellfish Growers Ass'n v. Holly Ridge Assoc.*, Case No. 7:01-CV-36-BO(3) (E.D.N.C. 2003) ("CWA violations cannot result from purely passive developments on a defendant's property.").

The Tenth Circuit distinguished the *Froebel* decision on the basis that it involved Section 404 of the CWA instead of Section 402 of the CWA. However, a cornerstone of statutory construction is that similar language within the same statutory section must be accorded a consistent meaning. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 481 (1998). The statutory language used by Congress in both sections of the CWA is identical. 33 U.S.C. § 1311(a) prohibits the "discharge" of pollutants except as authorized, *inter alia*, under Section 402 (permits for discharge of pollutants from a point source) and Section 404 (permits for discharge of dredged or fill material). In both instances "discharge" is defined as the "addition" of pollutants or materials. 33 U.S.C. § 1362(12).

Statutory language must also be given a common sense interpretation in harmony with the discernible intent of Congress. *Natural Resources Defense Council, Inc. v. Costle*, 564 F.2d 573, 579 (D.C. Cir. 1977). When looking at the language of the statute, a court must assume that the "legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S. 1, 9 (1962); *Perrin v. United States*, 444 U.S. 37, 42 (1979). Applying these long established principles of statutory construction to the statute in this case reveals that when Congress passed the CWA it intended to regulate only active conduct that results in a discharge of a pollutant.

The ordinary meaning of the word "addition" is "the act or process of adding." WEBSTER'S NEW COLLEGIATE DICTIONARY (1981); WEBSTER'S II NEW COLLEGE DICTIONARY (1995). Thus, the ordinary meaning of the word "addition" indicates that some form of active conduct is required to trigger the permit requirement in Section 402 of the CWA. Moreover, Congress made unlawful not the "discharge of any pollutant from any point source," but the "discharge of any pollutant from any point source by any person." 33 U.S.C. § 1311(a). By including the phrase "by any person" in the definition of what is unlawful, Congress intended for only "persons" who commit an "act" or create a "process" to be subject to the permitting requirement in Section 402. This conclusion is also supported by the use of the term "permit" in the CWA. According to Black's Law Dictionary, the noun "permit" means "any document which grants a person the right to do something" and a "license or grant of authority to do a thing." BLACK'S LAW DICTIONARY 1140 (6th ed. 1990).

Congressional intent in choosing the words "discharge," "permit," and "addition" would be frustrated if Section 402 liability were imposed based solely on passive property ownership. The Tenth Circuit's interpretation renders the phrase "by any person" in Section 301 superfluous and creates a new category of responsible party that was not contemplated by Congress in the CWA. The Seventh Circuit's interpretation of the dredged or fill material discharge prohibition is at odds with the Tenth Circuit's interpretation of the prohibition against point source discharges. By its plain language, the CWA requires an element that is lacking in this case: active conduct by a landowner causally related to the discharge of pollutants.

Unlike other federal environmental laws, the CWA does not define "owner or operator" in connection with the NPDES permitting system.[3] Subchapter IV of the CWA (entitled "Permits and Licenses"), which includes both Section 402 and Section 404, does not mention "owners" of point sources. For purposes of the CWA section concerning national standards of performance only, Congress defined the term "owner or operator" as "any person who owns, leases, operates, controls, or supervises a source," where the term "source" is defined as "any building, structure, facility, or installation from which there is or may be the discharge of pollutants." *See* 33 U.S.C. § 1316(a)(3) & (4). By statute, the only affirmative obligations that EPA can impose upon owners and operators of point sources are obligations to establish and maintain records, make reports, install and maintain monitoring equipment, sample water flows and provide such other information as EPA may reasonably require. *See* 33 U.S.C. § 1318(a)(A).

Congress could have defined the scope of liable parties for point source discharges to include passive landowners as it did in other circumstances. *See, e.g.*, 42 U.S.C. § 6925(a) ("the Administrator shall promulgate regulations requiring each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to have a permit issued pursuant to this section."); CWA, 33 U.S.C. § 1321(b)(6)(A) ("Any

[3] *See, e.g.*, the CWA's provisions regarding oil spills, 33 U.S.C. § 1321(a)(6), the Clean Air Act, 42 U.S.C. §§ 7411(a)(5) & 7412(a)(9), the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6924, and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601(20).

owner, operator, or person in charge of any vessel, onshore facility, or offshore facility – (i) from which oil or a hazardous substance is discharged . . . may be assessed a class I or class II civil penalty. . . .); CERCLA, 42 U.S.C. § 9607(a)(1) & (2) (potentially responsible parties include the owner and operator of a facility and "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of"). In CERCLA, Congress expansively defined the term "release" to encompass the passive migration of pollution. 42 U.S.C. § 9601(22) ("[t]he term 'release' means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment").

Where Congress has provided for "owner and operator liability," it has also enacted "innocent landowner" provisions that protect against the injustice of penalizing passive private property owners for conduct that occurred prior to passage of prohibitory legislation. *See, e.g.*, 33 U.S.C. § 1321(f)(1)(D) (liability for oil spills does not extend to discharges caused solely by acts or omissions of third parties); 42 U.S.C. § 9607(b) ("[t]here shall be no liability . . . for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by" other actors). The Tenth Circuit's interpretation of the scope of the NPDES point source permitting system does not afford El Paso or any other passive property owner such a defense. Congress did not intend for CWA point source liability to be imposed upon an innocent party merely because it owns land.

The trial court's ruling in this case, which has been reversed on factual grounds by the Tenth Circuit, demonstrates the harshness of imposing CWA liability based upon simple ownership of property. In 2001, El Paso had owned its property for 33 years and the CWA had been in effect for 29 years. During this time, no governmental or private party had ever indicated to El Paso that it could have CWA liability for discharges of pollutants from the Roosevelt Tunnel portal before Respondents sent their Notice of Intent to sue prior to commencing this citizen suit. Nonetheless, the District Court ordered El Paso to apply for a permit, reimburse Respondents $247,246.19 in attorney fees and costs and pay a penalty of $94,900 to the federal government. (App., *infra*, 71-74). Since El Paso had not committed any affirmative act related to water quality, the only basis for the district court's penalty must have been El Paso's property ownership.

It is undisputed that since its formation, El Paso has not acted in any way causally related to the addition or introduction of pollutants to the Roosevelt Tunnel or Cripple Creek. El Paso was formed and acquired its property in 1968 and has never conducted any mining or other operations on its property. If upheld, the Tenth Circuit's decision would require El Paso to obtain a permit in order to do nothing more than continue to own its land, an outcome Congress did not intend and one squarely in conflict with the Seventh Circuit's holding in *Froebel*.

If the legal holdings in this case were to affect only El Paso, the case might not merit review by this Court. However, the outcome herein will affect owners of thousands of abandoned mining sites, including the federal government and many states. In February 1996, the U.S. General Accounting Office estimated that there are

560,000 abandoned mining sites on public and private lands. U.S. GEN. ACCOUNTING OFFICE, INFORMATION ON EFFORTS TO INVENTORY ABANDONED HARD ROCK MINES, GAO/RCED-96-30 (Feb. 1996). A significant number of abandoned mine sites in the United States are located on federal lands. The National Park Service has estimated that land within its jurisdiction contains over 4,000 abandoned mine sites and the U.S. Fish and Wildlife Service estimates that it owns 240 such sites. GAO/RCED-96-30 at 1.

The U.S. Forest Service has inventoried "a total of approximately 39,000 abandoned mine sites, of which an estimated 1,800, or about 5 percent, are considered high priorities because they are or could be releasing hazardous substances." U.S. GEN. ACCOUNTING OFFICE, SUPERFUND: PROGRESS MADE BY EPA AND OTHER FEDERAL AGENCIES TO RESOLVE PROGRAM MANAGEMENT ISSUES, GAO/RCED-99-111 at 30 (April 1999). The Bureau of Land Management (BLM) has estimated that there are between 70,000 and 300,000 abandoned mining sites located on the public lands it administers, of which between 2,800 and 39,000 sites "may have contaminated material that poses potential risks to human health and the environment and must be addressed." GAO/RCED-99-111 at 36. BLM managers reported reluctance to identify contaminated lands due to fear that "once the sites are identified, BLM may be held financially liable for thousands of abandoned sites that it did not contaminate, particularly abandoned mine sites." GAO/RCED-99-111 at 38.

Many similar properties are also located on lands owned by state and local governments as well as on privately owned lands such as El Paso's. *See, e.g., Froebel*, 217 F.3d 928 (Waukesha County, Wisconsin); *Jones*, 333

F. Supp. 2d 1344 (Rockdale County, Georgia). The core of the Tenth Circuit's holding herein, that "if you own the leaky 'faucet,' you are responsible for its 'drips,'" creates potential CWA point source liability for all such passive private and government property owners.

If allowed to stand, the Tenth Circuit's ruling in this case would also undercut current Congressional efforts to address problems stemming from abandoned mines. On October 6, 2005, Colorado Senators Salazar and Allard introduced the proposed "Cleanup of Inactive and Abandoned Mines Act" to protect mining companies, communities, non-profit organizations, government entities and individuals that seek to clean up inactive or abandoned mine sites from incurring legal liability. S. 1848, 109th Cong. (2005). Under the proposed legislation, any "Good Samaritan" wishing to remediate an inactive or abandoned mine site could submit a proposed remediation plan to the EPA and host State for review. S. 1848, 109th Cong. § 2 (2005). The proposed cleanup would be required to "improve the environment on or in the area of the mine site to a significant degree" and meet, to the maximum extent reasonable and practicable under the circumstances, water quality standards. S. 1848, 109th Cong. § 3(f)(1)(A) (2005).

As defined by Senate Bill 1848, a Good Samaritan must: (1) be unrelated, by operation or ownership, to the historic mine residue to be remediated (except solely through succession to title); (2) have had no role in the creation of the historic mine residue; (3) have had no significant role in the environmental pollution caused by the historic mine residue; and (4) *not be liable* under any Federal, State, or local law for the remediation of the historic mine residue. S. 1848, 109th Cong. § 3(a)(4)

(2005). If legislation such as Senate Bill 1848 were enacted, the Tenth Circuit's decision would undercut the bill's effectiveness by denying innocent passive property owners Good Samaritan status because they would be unable to demonstrate that they are not liable for remediation of the historic mine residue. For example, El Paso might qualify as a Good Samaritan except that the Tenth Circuit's ruling herein disqualifies it under the legislation's plain language.

An applicant for a Good Samaritan permit under Senate Bill 1848 would also be required to certify that the applicant knows of no other person that is potentially legally responsible for the remediation of the mine site that has sufficient resources to complete the remediation. S. 1848, 109th Cong. § 3(e)(5) (2005). The Tenth Circuit decision would eviscerate this provision at least as to all government-owned sites because such government owners would be legally responsible for remediation of those mine sites and would have sufficient resources to complete cleanups. The Tenth Circuit's decision herein thus poses a substantial obstacle to current Congressional initiatives to address the abandoned mine problem.

Application of the decision in this case would require discharge permits for the passive owners of thousands of inactive mining sites, many of which are located on public lands and have not been mined for decades. The Tenth Circuit decision directly conflicts with the *Froebel* decision by failing to define the terms "addition" and "discharge" to require affirmative conduct as a predicate for CWA liability. If El Paso's property were located in the Seventh Circuit, it would not be required to obtain a NPDES permit under the circumstances of this case. Landowners are entitled to consistent treatment under the CWA

wherever they may be located, and for these reasons, this Court should grant the Petitioner's petition for a *writ of certiorari*.

II. THE TENTH CIRCUIT'S DECISION IN THIS CASE CONFLICTS WITH THIS COURT'S HOLDING IN *GWALTNEY V. CHESAPEAKE BAY FOUNDATION*.

Section 505(a)(1) of the Clean Water Act grants citizens, acting as private attorneys general, the right to bring civil actions against any person "alleged to be in violation of" the discharge permit requirement. 33 U.S.C. § 1365(a)(1). This Court has interpreted this language to preclude private actions based on wholly past violations. *Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49, 57 (1987). The statute requires a citizen to "allege a state of either continuous or intermittent violation – that is, a reasonable likelihood that a past polluter will continue to pollute in the future." *Id.*

Federal courts do not have subject matter jurisdiction over citizen suits based on wholly past violations of the Act because they are moot if it becomes "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 66 (quoting *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968)); *Friends of the Earth, Inc. v. Laidlaw Environmental (TOC) Services, Inc.*, 528 U.S. 167, 186 (2000). The critical time for determining whether there is an ongoing violation is when the complaint was filed.

In reaching its conclusion in *Gwaltney*, this Court was particularly mindful of the plain language used by Congress, noting:

> One of the most striking indicia of the prospective orientation of the citizen suit is the pervasive use of the present tense throughout § 505. A citizen suit may be brought only for violation of a permit limitation 'which is in effect' under the Act. 33 U.S.C. § 1365(f). . . . This definition makes plain what the undeviating use of the present tense strongly suggests: the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past.

Id. at 59 ("the interest of the citizen-plaintiff is primarily forward-looking."). This Court found further support for the forward-looking posture envisioned by Congress for citizen suits in the notice requirements of the statute, observing that the targeting of wholly past violations would make the notice requirement gratuitous. *Id.* at 60. The First Circuit Court of Appeals has held that the phrase "is alleged to be in violation" in the citizen suit provision of the CWA "speaks in terms of activity." *Pawtuxet Cove Marina Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1092 (1st Cir. 1987).

The federal courts appear to be divided regarding when a violation ceases to be ongoing and becomes "wholly past," particularly in cases (as here) "where the conduct that gave rise to the violation has ceased, but the *effects* continue." App., *infra*, 10 (emphasis in original). However, to Petitioner's knowledge, no reported case has ever addressed a situation where the conduct that gave rise to the alleged violation ceased even before the passage of the CWA and the passive landowner acquired the property after cessation of the conduct but also before passage of the CWA. There is an urgent need for this Court to resolve ongoing confusion in this area of law by addressing the issue.

In a case involving alleged violations of an existing discharge permit, the Ninth Circuit adopted the expansive interpretation that an ongoing violation exists until the risk of continued violation has been completely eradicated. *Sierra Club v. Union Oil*, 853 F.2d 667, 671 (9th Cir. 1988) (remanding the case and indicating penalties may not be imposed unless plaintiffs prove the existence of ongoing permit violations or the reasonable likelihood of continuing future violations). Two district courts have followed the Ninth Circuit's analysis to conclude that a violation is ongoing when a pollutant previously added to groundwater continues to reach a navigable water via groundwater migration. *See, Umatilla Waterquality Protective Ass'n v. Smith Frozen Foods*, 962 F. Supp. 1312, 1322 (D. Or. 1997) (held in *dicta* that CWA liability attaches where "the discharger simply collects pollutants that are later carried to navigable waters by rain water or gravity flow"); *Werlein v. United States*, 746 F. Supp. 887, 896-97 (D. Minn. 1990), *vacated in part on other grounds*, 793 F. Supp. 898 (1992) (denying motion to dismiss due to factual issues about whether alleged discharges were from a point source).

Other courts have reached a different conclusion, holding (both pre- and post-*Gwaltney*) that "continuing residual effects resulting from a discharge are not equivalent to a continuing discharge." *See, e.g., Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392, 397 (5th Cir. 1985). In *Hamker*, the earliest case to adopt this view, a citizen suit was brought after a pipeline leaked crude petroleum into a creek. *Id.* at 394. The Fifth Circuit affirmed dismissal of the complaint because the pipeline leak was a "wholly past" occurrence, even though contamination continued to migrate through the ground into

navigable waters. *Id.* at 398-99. According to the *Hamker* court, "[m]ere continuing residual effects resulting from a discharge are not equivalent to a continuing discharge." *Id.* at 397.

In 1987, the First Circuit Court of Appeals interpreted the phrase "is alleged to be in violation of." *Pawtuxet Cove Marina Inc.*, 807 F.2d 1089. In *Pawtuxet*, the plaintiffs sued an upstream permit holder for discharging effluent in violation of the permit. *Id.* at 1090-1091. By the time the case was resolved, the defendant had ceased operating under the permit and routed its effluent to a municipal treatment facility. *Id.* at 1091. Citing the *Hamker* decision with approval, the court concluded that "the words 'is . . . in violation' should be sufficiently liberally construed to comport with the injunctive purpose of the Act – *conduct* indicative of continuing or renewed violations justifying an injunction, as distinguished from matters over and apparently done with, that would not warrant one." *Id.* at 1093 (emphasis supplied).

The Second Circuit adopted the same reasoning in 1993. *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305 (2d Cir. 1993). In *Remington*, the alleged discharger was a trap and skeet shooting club where lead shot and clay target fragments had been added to the land and waters surrounding the club over a period of nearly seventy years. *Id.* at 1308. According to the court, "none of the lead shot or the clay target fragments [had] been removed from" the surrounding property or waters. *Id.* at 1310. The Second Circuit affirmed the trial court's grant of summary judgment in favor of the shooting club under Sections 402 and 404 of the CWA because "Remington ceased operation of the Gun Club by the time plaintiff filed suit in April 1987." *Id.* at 1312. The court noted that

"[t]he present violation requirement of the Act would be completely undermined if a violation included the mere decomposition of pollutants" and that "plaintiff's Clean Water Act suit against Remington was directed at wholly past violations." *Id.* at 1313.

In 1995, the New Mexico district court adopted the reasoning of the First, Second and Fifth circuit courts of appeal and held that "[m]igration of residual contamination resulting from previous releases is not an ongoing discharge within the meaning of the [Clean Water] Act." *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1354 (D.N.M. 1995). In 1998, the Wyoming district court found that the presence of PCE-contaminated groundwater from past operations did not support a citizen suit. *Wilson v. Amoco Corp.*, 33 F. Supp. 2d 969, 975 (D. Wyo. 1998) ("operations sufficient to result in the release of contaminants concluded years ago at each of the Defendants' facilities. . . . only in rare circumstances will an ongoing CWA violation exist when the facilities from which the contaminants are emanating have themselves ceased operating"). In 2001, the district court for the Eastern District of New York adopted the same analysis in a citizen suit against a municipality regarding leachate from a closed landfill that migrated into a pond and was conveyed by culverts to a stream. *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 121 (E.D.N.Y. 2001) (defendant not liable as past polluter for ongoing, migrating leachate plume).

The Tenth Circuit distinguished these cases on the basis that the facts herein "involve an *ongoing discharge* of pollutants from a point source into navigable waters" rather than "the continuing migration of contaminants from a past discharge." App., *infra*, 12 (emphasis in original). According

to the Tenth Circuit, the critical difference lies in the point in time at which the pollutant exits the point source, and not the point in time when the conduct that created the point source occurred (*i.e.*, construction of the Roosevelt Tunnel or the El Paso shaft).

The Tenth Circuit's interpretation leads to an inequitable result that Congress did not intend. Even though El Paso admittedly has engaged in no culpable conduct,[4] El Paso actually faces greater liability under the CWA than a party that formerly engaged in culpable conduct in the past but has since ceased that activity. Hence, parties that caused "a spill, the accidental leakage at a chemical plant, the discharge of lead shot and clay targets at a firing range, or dumping of waste rock at a mine" are immune from CWA liability simply because "[a]t the time of suit, the discharging activity *from a point source* in all of these cases had ceased; all that remained was the migration, decomposition, or diffusion of the pollutants into a waterway." App., *infra*, 12-13 (internal citations omitted) (emphasis in original).

Congressional intent to limit citizen suits to ongoing violations does not inhibit governmental enforcement of the CWA. The federal and state governments may bring criminal or civil actions for wholly past violations of the CWA even though citizen suits are barred. 33 U.S.C. § 1319. Governmental actions were envisaged to be the central enforcement arm under the Act. *Hamker*, 756 F.2d at 395. Citizen suits, by contrast, are meant to supplement, not

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[4] The sole action by El Paso that has subjected it to this citizen suit is purchasing an abandoned mining property in 1968, four years prior to passage of the CWA.

supplant, government enforcement action. *Gwaltney*, 484 U.S. at 60 ("Permitting citizen suits for wholly past violations of the Act could undermine the supplementary role envisioned for the citizen suit. . . ."). The Fifth Circuit noted "it [is] unlikely that Congress's explicit restrictions on the right to bring private enforcement actions significantly impair the efficacy of the general regulatory framework." *Sierra Club v. Shell Oil Co.*, 817 F.2d 1169, 1175 (5th Cir. 1987) (citizen suit barred for oil company's multiple, sporadic, past violations of effluent limitations in its discharge permits).

The exercise of federal jurisdiction in cases like the instant one is contrary to the supplementary purpose of the citizen suit provision. *Gwaltney*, 484 U.S. at 60-61. Indeed, Respondents' citizen suit in this case has effectively supplanted the efforts of the Colorado WQCD and subjected El Paso to inconsistent factual determinations regarding liability for the Roosevelt Tunnel discharge. The Respondents have abused the citizen suit process by bringing multiple lawsuits against different parties for the same discharge, while ignoring the responsibility of the point source owner itself.[8] The factual findings of the district court herein are in direct conflict with those in the ongoing WQCD enforcement proceeding against El Paso. The Colorado district court will soon enter findings of fact on this same issue in Respondents' second Roosevelt Tunnel citizen suit, which is presently scheduled to commence trial in February 2006.

[8] The Roosevelt Tunnel portal is controlled by the BLM. Petitioner is unaware of any CWA enforcement activity or citizen suit against the BLM regarding the Roosevelt Tunnel portal.

Citizen suits may offer a useful supplement to government enforcement in simple CWA cases, but abandoned mine cases (such as here) often present complex technical issues involving multiple pollutant sources, hydrology and geochemistry. As shown by the differing outcomes in parallel federal and state proceedings regarding the Roosevelt Tunnel, enforcement of the CWA in cases concerning abandoned mines or multiple source discharges should be entrusted to the regulatory agencies with the appropriate technical expertise to resolve these issues.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 19, 2006.

421 F.3d 1133

United States Court of Appeals,
Tenth Circuit
SIERRA CLUB and Mineral Policy Center,
Plaintiffs-Appellees,
v.
EL PASO GOLD MINES, INC., Defendant-Appellant,
and
Mountain States Legal Foundation, Amicus Curiae.
No. 03-1105.

Aug. 24, 2005.
As Corrected on Denial of Rehearing Oct. 21, 2005.

Stephen D. Harris (with Connie H. King and James L. Merrill with him on the briefs) Merrill, Anderson, King & Harris, LLC, Colorado Springs, CO, for Defendant-Appellant El Paso Gold Mines, Inc.

John M. Barth, Hygiene, CO (with Paul Zogg, Law Office of Paul Zogg, Boulder, CO, and Roger Flynn and Jeff Parsons, Western Mining Action Project, Boulder, CO, with him on the brief), for Plaintiffs-Appellees Sierra Club and Mineral Policy Center.

Steven J. Lechner and William Perry Pendley, Mountain States Legal Foundation, Lakewood, CO, filed an Amicus Curiae brief on behalf of Defendant-Appellant El Paso Gold Mines, Inc.

Before MURPHY, McKAY, and TYMKOVICH, Circuit Judges.

TYMKOVICH, Circuit Judge.

The Clean Water Act ("CWA" or "Act") prohibits the discharge of any pollutant from a point source unless authorized by a permit issued under the National Pollutant

Discharge Elimination System ("NPDES"). 33 U.S.C. §§ 1311(a), 1342. Under the Act, a "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The Act also confers jurisdiction on the federal courts to hear citizen suits brought against any person "alleged to be in violation of" the Act. 33 U.S.C. § 1365(a).

The Sierra Club and the Mineral Policy Center ("Plaintiffs") filed a citizen suit in federal district court against a land owner, El Paso Gold Mines, Inc., whose abandoned mine shaft is allegedly discharging pollutants into Cripple Creek, a navigable water under the Act. A magistrate judge, hearing the case by consent, granted the Plaintiffs' motion for summary judgment, and this appeal followed.

On appeal we must decide three questions regarding the application of the CWA to the facts of this case: First, whether the alleged conduct in this case amounts to a "wholly past violation," *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 64, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987), thus stripping the district court of subject matter jurisdiction under § 1365(a); second, whether Congress intended to require owners of inactive mines such as El Paso to obtain discharge permits under §§ 1311(a) and 1342; and third, whether the Plaintiffs have met their burden of showing that pollutants actually were discharged into Cripple Creek.

We agree with the magistrate judge on the first two issues, but hold that genuine issues of material fact exist, and, therefore, summary judgment was improperly

granted. Accordingly, we reverse and remand the case for further proceedings.

I. BACKGROUND

A. Relevant Facts

El Paso owns approximately 100 acres of land west of Colorado Springs, between the towns of Cripple Creek and Victor, in Teller County, Colorado. Founded in 1968, El Paso has never conducted any mining operations on its property, although it may in the future. Located on this property is an inactive gold mine, the El Paso mine, as well as a partially collapsed mine shaft known as the El Paso shaft. The El Paso shaft is a vertical shaft – formerly an elevator shaft used by miners to access various levels of the El Paso mine – that connects the mine to the Roosevelt Tunnel. The Roosevelt Tunnel is a mine drainage tunnel, six miles in length, that was constructed around 1910 to drain groundwater from the mines in the Cripple Creek Mining District. The Roosevelt Tunnel underlies and connects to numerous properties, including El Paso's.

Snow melt and groundwater make their way to the Roosevelt Tunnel through a series of drainage tunnels and underground shafts, including the El Paso mine shaft. Water also apparently enters and exits the tunnel through cracks and fractures in the rock along the tunnel's six-mile length. The tunnel ends at the Roosevelt Tunnel portal, and here the tunnel discharges water into Cripple Creek, which eventually empties into the Arkansas River. The El Paso shaft connects to the Roosevelt Tunnel approximately two and half miles from the tunnel portal.

B. Proceedings in the District Court

In November 2001, the Sierra Club and the Mineral Policy Center filed a citizen suit against El Paso in federal district court under the Clean Water Act, codified at 33 U.S.C. § 1251 et seq. According to the Plaintiffs, El Paso violated Section 402 of the Act, 33 U.S.C. § 1342, by discharging pollutants (namely, zinc and manganese) from a point source into Cripple Creek without a valid permit.[1] The district court referred the case to a magistrate judge under 28 U.S.C. § 636(c).

In September 2002, following discovery, the parties filed cross-motions for summary judgment pursuant to Federal Rule of Civil Procedure 56(c). El Paso argued, first, that the court lacked subject matter jurisdiction over this citizen suit because the Plaintiffs had failed to allege an ongoing violation of the Act. Because it had never engaged in active mining, El Paso argued that it was not "alleged to be in violation of" the Act, a required prerequisite for a citizen suit under Section 505(a)(1), 33 U.S.C. § 1365(a)(1). The magistrate judge disagreed, however, holding instead that this was not a case of "wholly past violations," *Gwaltney*, 484 U.S. at 64, 108 S.Ct. 376, but rather "the continuing migration of pollutants into navigable water was occurring because of a past discharge from a point source." *Sierra Club, et al v. El Paso Gold Mines, Inc.*, Civ. No. 01-PC-2163 (OES), slip op. at 13

[1] In November 2000, the Plaintiffs filed a separate CWA citizen suit against several active mining companies. *See Sierra Club, et al v. Cripple Creek & Victor Gold Mining, Co.*, Civ. No. 00-MK-2325 (OES) (D.Colo. Nov. 28, 2000). In that case, the Plaintiffs allege the mining companies are liable for violations of the CWA due to discharges occurring at the Roosevelt Tunnel and the Carlton Tunnel (another mine drainage tunnel located in the Cripple Creek mining district).

(D.Colo. Nov. 15, 2002) ("Order"). In addition, the magistrate judge noted that "there is no evidence that El Paso's intermittent or sporadic violations of the CWA are not likely to recur." *Id.* at 14. Thus, the magistrate judge held that the court had subject matter jurisdiction under Section 505(a)(1) notwithstanding the fact that El Paso had not contributed to the alleged pollution through any of its own mining.

El Paso argued next that purely passive land owners cannot be liable for discharges under Section 301(a), 33 U.S.C. § 1311(a), and therefore they were not required to obtain a discharge permit pursuant to Section 402, 33 U.S.C. § 1342. This argument was based on the definition of "discharge," which is "any *addition* of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis added). Because the word "addition" implies affirmative conduct by the land owner, El Paso argued it could not, as a matter of law, be liable under the Act. The magistrate judge again disagreed, favoring instead the Plaintiffs' interpretation of the statutory language. According to the magistrate judge, "[t]he key to liability under the CWA is the ownership or operation of a point source which 'adds' pollutants to navigable waters," and liability therefore attaches "not on the activity which results in the point source discharge, but rather on the point source discharge itself." Order at 23-24.

Finally, El Paso argued the Plaintiffs had failed to put forth any evidence establishing a hydrological connection between the El Paso shaft and the Roosevelt Tunnel portal nearly two and half miles away. It was undisputed that water samples taken at the shaft and the portal both

contained zinc and manganese.[2] But according to El Paso, there was no evidence linking the water from the shaft to water discharged at the portal, and therefore the Plaintiffs had failed to prove El Paso added pollutants to navigable waters.[3] In reviewing this claim, the magistrate judge considered the expert testimonies proffered by the parties. Although the experts disagreed in many respects, the magistrate judge found the experts agreed that "some of the water flowing into the Tunnel from the El Paso shaft reaches the Tunnel portal intermittently and flows into Cripple Creek." *Id.* at 29. Thus, the magistrate judge held that the Plaintiffs had established the necessary hydrological link.

Having rejected each of El Paso's arguments, the magistrate judge granted summary judgment for the Plaintiffs. In a subsequent order, the magistrate judge ordered El Paso to pay $94,900 in civil penalties, as well as attorneys' fees and costs. The magistrate judge also ordered El Paso to apply for an NPDES permit.

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[2] Water samples taken from the El Paso shaft in October 1994 show 4.1 milligrams of zinc per liter (mg/l). Samples taken from the El Paso shaft in November 2000 show manganese of 27.9 mg/l. Samples collected at the Roosevelt Tunnel portal between November 1995 and October 2000 show varying amounts of zinc (between .05 and 3.46 mg/l) and manganese (between .0049 and 39.9 mg/l). This sampling data was collected by Cripple Creek & Victor Gold Mining Co., whose property overlies portions of the Roosevelt Tunnel.

[3] The magistrate judge found that Cripple Creek, which accepts Roosevelt Tunnel's discharge, is a "navigable water" under 33 U.S.C. § 1362(7). *See* Order at 16-17. El Paso does not challenge this ruling on appeal, and we therefore accept it as true for purposes of this opinion.

C. Parallel State Administrative Proceedings

Concurrent with the federal proceedings described above, the Colorado Water Quality Control Division ("CWQCD") was pursuing an administrative action against El Paso based on the same facts giving rise to the citizen suit. On July 25, 2002, the CWQCD issued a Notice of Violation/Cease and Desist Order, alleging that El Paso's "ongoing discharge of pollutants into the Roosevelt Tunnel, and from the Roosevelt Tunnel into Cripple Creek constitutes an unauthorized discharge of pollutants from a point source(s) into state waters." Aplt. App. I, at 242. The CWQCD's case was referred to a state administrative law judge for adjudication. Following discovery, cross-motions for summary judgment, and oral argument, the ALJ issued an initial decision in December 2002, approximately one month after the magistrate judge had granted the Plaintiffs' motion for summary judgment in the federal case.

In the initial decision, the ALJ considered arguments similar to those addressed by the magistrate judge. The ALJ concluded that the Colorado Water Quality Control Act was applicable to point source owners such as El Paso. Thus, as with the federal case, El Paso could be liable for pollutants running out of its mine workings even though it was not currently mining the property. However, contrary to the magistrate judge's conclusion, the ALJ saw no evidence establishing a hydrological connection between the El Paso shaft and the Roosevelt Tunnel portal. The ALJ stated:

> [CWQCD] has failed to prove that the zinc and manganese in the water coming out of the Roosevelt Tunnel portal has its origin in the El Paso Mine. Reliable measuring devices to determine the flow of water in the Roosevelt Tunnel have

> not been used. This, along with the dramatic drop in zinc and manganese concentrations from the El Paso Shaft to the portal, casts sufficient doubt on whether any of the zinc and manganese tested at the portal is coming from the El Paso Mine.

Aplt. Supp. App. at 203.

Nevertheless, despite the lack of evidence linking water from the shaft to the tunnel's portal, there was sufficient evidence that the El Paso shaft was discharging pollutants into *state* waters from a point source. *See* Colo.Rev.Stat. § 25-8-501 (2004). The ALJ found that the water in the Roosevelt Tunnel constituted "state waters" as defined in Colo.Rev.Stat. § 25-8-103(19) (2004), and the evidence showed the El Paso shaft was discharging pollutants into those waters. The state of Colorado and El Paso agreed to stay further administrative proceedings until the federal court proceedings had ended. The ALJ's initial decision, therefore, has not been appealed.

D. Appellate Proceedings

Following appellate briefing and oral argument, we became concerned that our decision may interfere with the state's administrative processes. We therefore ordered the parties to brief a number of additional questions regarding the status of the state proceedings and the desirability of a stay of this appeal pending finality by the state. In January 2005, we abated the case, noting in part that the CWA manifests a "pro-federalism thrust" whereby states have the primary role in administration and enforcement. *See* 33 U.S.C. §§ 1251(b), 1342(b) and (c). Nevertheless, because these matters have been pending for some time, we

stated that if the State of Colorado and El Paso were not able to lift the stay in the state administrative matter and commence further proceedings or settle this matter within ninety days of our order, we would lift our abatement and rule on the merits.

The parties have informed us that the state proceedings have been stayed by agreement of the parties. Settlement and mediation have also been unsuccessful. We therefore agree with the parties that the underlying issues in this case will be advanced by our resolution of this appeal.

II. ANALYSIS

A. Subject Matter Jurisdiction for "Wholly Past" Violations

We first address whether the magistrate judge erred in finding that subject matter jurisdiction exists to hear this case. Section 505(a)(1) of the CWA grants citizens the right to bring civil actions against any person "alleged to be in violation of" effluent standards or limitations. 33 U.S.C. § 1365(a)(1). There has been much debate in recent years regarding when a person is "in violation of" the CWA, particularly with respect to whether the defendant must currently be engaged in the polluting practice or, instead, whether jurisdiction lies for past practices that have ceased by the time the suit is filed.

In 1987, the Supreme Court took a step toward resolving the confusion with its opinion in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987). In *Gwaltney*, the Supreme Court held that Congress, by using the present tense phrase "in violation," did not intend to

permit citizen suits based on "wholly past violations" of the CWA. Instead, the Court reasoned that because the language and structure of the citizen suit provision is "primarily forward-looking" or preventative, *id.* at 59, 108 S.Ct. 376, the most natural reading of Section 505(a)(1) requires "citizen-plaintiffs [to] allege a state of either continuous or intermittent violation – that is, a reasonable likelihood that a past polluter will continue to pollute in the future." *Id.* at 57, 108 S.Ct. 376. Thus, to establish jurisdiction, citizen-plaintiffs need only make good-faith allegations of continuous or intermittent violations. *Id.* at 64, 108 S.Ct. 376. Defendants such as El Paso may then challenge the plaintiff's allegations by showing that any violations, *i.e.*, discharges, have ceased and are not likely to recur. "If the defendant fails to make such a showing after the plaintiff offers evidence to support the allegation, the case proceeds to trial on the merits, where the plaintiff must prove the allegations in order to prevail." *Id.* at 66, 108 S.Ct. 376.

1.

Although it is now clear that citizen suits cannot be based on effluent violations that occurred entirely in the past, other issues raised by *Gwaltney* remain unresolved. One such issue is presented here: When is a CWA violation "continuous or intermittent" such that it can be characterized as an ongoing violation rather than a wholly past violation? Answering this question is particularly difficult in cases such as this where the conduct that gave rise to the violation has ceased, but the *effects* continue.

Some courts, interpreting the CWA and *Gwaltney* expansively, have held that the continuing migration of

pollutants from past discharges is sufficient to establish jurisdiction under Section 505(a)(1). *See Umatilla Water-quality Protective Ass'n v. Smith Frozen Foods, Inc.*, 962 F.Supp. 1312, 1322 (D. Or. 1997) (holding "a discharge of pollutants is ongoing if the pollutants continue to reach navigable waters, even if the discharger is no longer adding pollutants to the point source itself"); *Werlein v. United States*, 746 F.Supp. 887, 897 (D. Minn. 1990) (holding pollutants from past discharges that are released over time by infiltration of contaminated soil is "ongoing pollution"), *class. cert. vacated by* 793 F.Supp. 898 (D. Minn. 1992).

Other courts, before and after *Gwaltney*, have reached the opposite conclusion, holding that the migration of residual contamination from prior discharges is not an ongoing violation. *See Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1312-13 (2d Cir. 1993) ("The present violation requirement of the Act would be completely undermined if a violation included the mere decomposition of pollutants."); *Pawtuxet Cove Marina v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1094 (1st Cir. 1986) (dismissing citizen suit because the alleged polluter had ceased operations by the time of the suit); *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 397 (5th Cir. 1985) (dismissing complaint because it "alleges only a single past discharge with continuing effects, not a continuing discharge"); *Aiello v. Town of Brookhaven*, 136 F.Supp.2d 81, 120 (E.D.N.Y. 2001) (holding CWA does not allow citizen suit against a past polluter "for the ongoing migrating leachate plume"); *Wilson v. Amoco Corp.*, 33 F.Supp.2d 969, 975-76 (D. Wyo. 1998) (concluding "that migration of residual contamination from previous releases does not constitute an ongoing discharge"), *factual*

background stated in 989 F.Supp. 1159 (D. Wyo. 1998); *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F.Supp. 1333, 1354 (D.N.M. 1995) (finding no ongoing discharge from pile of waste rock on surface); *Brewer v. Ravan*, 680 F.Supp. 1176, 1183 (M.D. Tenn. 1988) (dismissing citizen suit based on allegations made against a permanently closed manufacturing plant).

2.

According to El Paso, we lack jurisdiction to hear this case based on this latter set of cases. The El Paso shaft, the argument goes, is merely a conduit through which pollutants from past discharges are alleged to flow. If this were simply a case about the continuing migration of contaminants from a past discharge, El Paso's argument might have some appeal. But contrary to El Paso's characterizations, more is at issue here. Instead, as recognized by the magistrate judge, the Plaintiffs in this case have alleged "an *ongoing discharge* of pollutants from a point source into navigable waters." Order at 13 (emphasis added). This factual distinction renders the cases cited by El Paso inapplicable.

The ongoing migration cases relied on by El Paso all involve an identifiable discharge from a point source that *occurred in the past*, whether it be a spill, *Wilson*, 989 F.Supp. at 1163, the accidental leakage at a chemical plant, *Hamker*, 756 F.2d at 394, the discharge of lead shot and clay targets at a firing range, *Remington Arms*, 989 F.2d at 1309, or dumping of waste rock at a mine, *LAC Minerals*, 892 F.Supp. at 1337. At the time of suit, the discharging activity *from a point source* in all of these cases had ceased; all that remained was the migration,

decomposition, or diffusion of the pollutants into a waterway. In contrast, this case does not involve the mere migration, decomposition, or diffusion of pollutants from an identifiable discharge that occurred sometime in the past. That the mine shaft itself is a point source is not reasonably contestable. Here, the discharge from the point source is occurring now, and is not the result of some past discharge that occurred on the surface of El Paso's property. The Act defines "point source" as, among other things, "any discernible, confined and discrete conveyance, including but not limited to any . . . tunnel [or] conduit . . . from which pollutants are or may be discharged."[4] 33 U.S.C. § 1362(14). The magistrate judge concluded that the El Paso shaft was a "point source" as defined by the Act, and El Paso does not challenge this determination on

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[4] This section reads, in its entirety,

> The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

The CWA also regulates *nonpoint* source discharges. *See* 33 U.S.C. §§ 1288, 1329. Nonpoint source pollution is not statutorily defined, although it is commonly understood to be pollution arising from dispersed activities over large areas that is not traceable to a single, identifiable source or conveyance. *See League of Wilderness Defenders/Blue Mts. Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002). Groundwater seepage that travels through fractured rock would be nonpoint source pollution, which is not subject to NPDES permitting. Thus, absent the El Paso shaft, which is undoubtedly a point source, this case would implicate a different set of issues altogether.

appeal. Thus, since plaintiffs have alleged the contemporaneous discharge from a point source – the El Paso shaft – which flows through other conveyances to navigable waters, CWA jurisdiction is established.

Admittedly, our conclusion is largely driven by the unique facts of this case. As alleged by Plaintiffs, the hydrology of the El Paso shaft and Roosevelt Tunnel is such that pollutants continually flow through the rock and mine workings until they reach the shaft, where they are then discharged into the tunnel. The Roosevelt Tunnel, in fact, was originally constructed for the very purpose of draining groundwater from the rock and lowering the water table so that early twentieth century miners could more easily access the desired mineral veins. The shaft and tunnel are therefore working as originally intended, with the unfortunate byproduct being that water which is discharged from the shaft apparently contains some pollutants. The origin of these pollutants is not precisely known, but El Paso has yet to put forth any evidence to rebut the allegation that pollutants are currently discharging and will continue to discharge in the future.

This would be a far different case if there were no point source connection from El Paso's property into the Roosevelt Tunnel. If the Plaintiffs complained only that the pollutants migrated from surface waste piles through the ground to the tunnel, or seeped into the tunnel from naturally occurring mineral deposits in the ground, El Paso's argument as a passive landowner would have considerable force. But here we have a man-made point source that delivers pollutants and continues to discharge them into the Roosevelt Tunnel. These facts distinguish this case from those involving the migration of pollutants from prior discharges.

In sum, the discharge of pollutants at the El Paso shaft is alleged to be recurring and ongoing, and El Paso has not shown any facts that suggest otherwise. Thus, finding the Plaintiffs have made "a good-faith allegation of continuous or intermittent violation," *Gwaltney*, 484 U.S. at 64, 108 S.Ct. 376, we hold that the magistrate judge did not err in asserting subject matter jurisdiction over this case. In our view, the Plaintiffs have sufficiently alleged that El Paso is "in violation of" effluent standards or limitations under Section 505(a)(1), 33 U.S.C. § 1365(a)(1).

B. Liability Under § 402(a) of the CWA for "Discharge" of a Pollutant

As noted, Section 301(a) of the CWA states that "the discharge of any pollutant by any person shall be unlawful," unless authorized by an NPDES permit. 33 U.S.C. § 1311(a). The CWA sets forth guidelines for the NPDES permits for the discharge of pollutants in Section 402, 33 U.S.C. § 1342. To establish a violation of these sections, a plaintiff must prove that the defendant (1) discharged (2) a pollutant (3) into navigable waters (4) from a point source (5) without a permit. *See Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982).

1.

In granting the Plaintiffs' motion for summary judgment, the magistrate judge found that each of these elements had been proved. On appeal, El Paso and amicus curiae Mountain States Legal Foundation focus our attention on the first required element, *i.e.*, that the defendant "discharge" a pollutant. As defined by the CWA, the term "discharge of a pollutant" means the "*addition* of

any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis added). As explained below, we agree with Plaintiffs that El Paso can be liable under Sections 301(a) and 402 for the "discharge" occurring at the El Paso shaft.

The Plaintiffs cite ample authority from case law for the proposition that discharges from inactive mines can violate the CWA. *See Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993) (holding that the collecting and channeling of surface runoff from inactive mine is "discharge of pollutants"); *American Mining Congress v. EPA*, 965 F.2d 759, 764-66 (9th Cir. 1992) (holding EPA regulation requiring discharge permit for stormwater runoff from inactive mine is reasonable); *Beartooth Alliance v. Crown Butte Mines*, 904 F.Supp. 1168, 1172-74 (D. Mont. 1995) (holding defendants liable for discharges from inactive mine). Administrative regulations and an EPA policy statement provide further support for this view. *See* 40 C.F.R. § 122.26(b)(14)(iii) (stating "active or inactive mining operations" are among the industrial activities that require a stormwater discharge permit under 33 U.S.C. § 1342(p)); EPA Region VIII policy statement, Ref. 8WM-C (Dec. 22, 1993) (stating "discharges from abandoned mine adits are point sources which require a traditional NPDES permit").

But these authorities, which merely establish a rule that inactive or abandoned mining sites are not entirely exempt from NPDES regulation, do little to advance the Plaintiffs' argument. El Paso's argument on appeal is more nuanced. El Paso, as the successor owner to the mining company that constructed the mine shaft point source, argues that it has never conducted *any* mining operations on its property; characterizing itself therefore as a purely

"passive landowner." El Paso then argues it cannot be liable for the "discharge" (*i.e.*, addition) of any pollutants. In other words, the issue is not the inactive status of the El Paso mine, but whether the definition of "discharge" requires some affirmative conduct by El Paso. As the magistrate judge recognized, this distinction renders inapplicable the cases cited by Plaintiffs because the defendants in those cases had engaged in active mining operations at some point or participated in the construction of a point source on their property.

2.

Our task, then, broadly defined, is to discern whether Congress intended successor owners of a point source to be subject to Section 402's NPDES permitting requirements. "As in all statutory construction cases, we begin with the language of the statute." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002). If the statutory language is not ambiguous, and "the statutory scheme is coherent and consistent," our inquiry is at an end. *Id.* (quotation omitted). However, if the language of the statute is ambiguous, meaning it can be reasonably understood in two or more different senses, *United States v. Quarrell*, 310 F.3d 664, 669 (10th Cir. 2002), we must dig further. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). The process of statutory construction has been described as "a holistic endeavor," taking into account, at a minimum, the "statute's full text, language as well as punctuation, structure, and subject matter."

United States Nat'l Bank v. Indep. Ins. Agents of Am., 508 U.S. 439, 455, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993).

We begin, therefore, with the statute's text: Unless authorized by an NPDES permit, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). The "discharge of a pollutant," as noted, means the "addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The Act does not otherwise define the term "addition," and the legislative history is silent on the matter. *See Catskill Mts. Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 493 (2d Cir. 2001). "Addition" is defined by Webster's New International Dictionary (2002) as "the act or process of adding."[5]

El Paso argues the plain meaning of the word "addition" requires affirmative conduct by some actor before liability attaches. Amicus argues further that Congress made unlawful the addition of any pollutant from any point source *"by any person."* 33 U.S.C. § 1311(a) (italics added). This additional language, argues amicus, shows

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[5] Thus, read together, the Act requires the following:

"the discharge" (§ 1311)

[defined as the "addition" (§ 1362(12))]

[meaning the "act or process of adding" (Webster's)]

"of any pollutant" (§ 1362)(12))

"to navigable waters" (§ 1362)(12))

"from any point source" (§ 1362(12))

[defined as "any ... channel, tunnel, conduit, well, discrete fissure" (§ 1362(14))]

"of any pollutant" (§ 1311)

"by any person" (§ 1311)

"shall be unlawful." (§ 1311).

Congress only meant to penalize active conduct by "persons" that results in a discharge of pollutant, not purely passive owners of a point source. The Plaintiffs, on the other hand, emphasize the determiner "any." Because "discharge" is defined as "*any* addition of *any* pollutant to navigable waters from *any* source," 33 U.S.C. § 1362(12), the Plaintiffs argue the focus of the Act is not on who does the discharging, but rather the fact of discharge.

Our task in answering this question is made easier by considering the context of the statute. *See United States v. Nichols*, 184 F.3d 1169, 1171 (10th Cir. 1999) (when interpreting statutory language, "appellate courts must examine the . . . language in context, not in isolation"). When viewed as a whole, it is apparent the liability and permitting sections of the Act focus on the point of discharge, not the underlying conduct that led to the discharge. *See, e.g.*, 33 U.S.C. § 1311(e) (stating that effluent limitations established by this section "shall be applied to all point sources or discharge of pollutants"); *id.* at § 1342(a)(1) (stating the EPA may "issue a permit for discharge of any pollutant"); *see also id.* at § 1251(a)(3) (stating "it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited"). Furthermore, as the magistrate judge noted, the Act consistently refers to the obligations of the "owners and operators" of a point source, suggesting that successor land owners such as El Paso are covered by the Act's provisions if they are responsible for a functional point source. *See, e.g., id.* at § 1311(g)(2) (providing that "owner or operator" of a point source may apply for modification of permit requirements); *id.* at § 1318(a) (stating that EPA shall require the "owner or operator" of a point source to establish and maintain records and perform other monitoring duties).

Thus, in our view, the Act's language does not exempt successor landowners from liability under Sections 301(a) and 402 for point source discharges occurring on their land. Although we agree the term "addition" implies affirmative conduct, such a requirement is satisfied by the contemporaneous introduction of polluted water from El Paso's property, through a point source owned and maintained by El Paso, to a navigable stream, Cripple Creek.

Regulations promulgated by the EPA provide some interpretative support. The phrase "addition of any pollutant" is defined as "surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances *owned by a . . . person* which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works." 40 C.F.R. § 122.2 (emphasis added); *see also* EPA Notice, 55 Fed.Reg. 35248-01 (Aug. 28, 1990) (stating drainage from abandoned mines can be point source pollution where the owner can be found; otherwise, it is nonpoint source pollution). While not a substitute for the CWA's plain language, this regulation reinforces the view that ownership of a point source will trigger liability. Moreover, in a regulation requiring NPDES permits for stormwater runoff from inactive mines, the EPA defines inactive mines as "mining sites that are not being actively mined, *but which have an identifiable owner/operator.*" 40 C.F.R. § 122.26(b)(14)(iii) (emphasis added). Again, the focus here is on ownership of the point source, not the discharge-causing conduct. Significantly, El Paso points to no regulations, and we have found none, which support the view that successor landowners not currently mining their property are exempt from liability where a point source is still discharging pollutants.

3.

El Paso does, however, cite some case authority for its position. The Seventh Circuit was faced with a case involving CWA liability for pollutants (silt and sediment) caused by the removal of a 150-year-old dam. In *Froebel v. Meyer*, 217 F.3d 928 (7th Cir. 2000), the court considered whether a landowner, Waukesha County, could be liable under Section 404 of the CWA. Although the county was not involved in the dam's removal, it owned the property on which the dam was located at the time plaintiff filed suit. *Id.* at 932. The plaintiff's theory was that the opening in the dam during demolition became a point source that channeled silt laden water downstream. They argued that Waukesha County needed a permit for the river's now unimpeded flow. *Id.* But the County had nothing to do with the dam's construction, operation, or demolition. The Seventh Circuit stated that the definition of "discharge" under Section 404 "strongly suggest[s] that a Section 404 permit is required only when the party allegedly needing a permit takes some action, rather than doing nothing whatsoever." *Id.* at 938. Thus, the court dismissed the case against the county on the grounds that "[plaintiff's] claim would essentially require Waukesha County to seek a permit to do nothing but continue to own the land." *Id.* at 939.

Although this case offers some support to El Paso's interpretation of the CWA, we find it unpersuasive for three reasons. First, the portion of the *Froebel* opinion relied on by El Paso interprets Section 404 of the CWA, not Section 402, which is at issue in this case. It is true that the court in *Froebel* was construing the word "discharge," which applies to both CWA sections. But whereas Section 402 addresses the "discharge of any pollutant," Section

404 addresses "discharge of dredged or fill material." 33 U.S.C. § 1344(a). This latter phrase is defined as "any addition of dredged material . . . including redeposit of dredged material other than incidental fallback" into navigable waters. 33 C.F.R. § 323.2(d)(1). The requirement that the alleged violator introduce the pollutants into the water is made clearer by the terms "dredged" and "redeposit," words that do not appear in Section 402. In fact, in *Froebel* the dredged material was already in the navigable waters.

Second, whereas Section 402 focuses on the point source and its ownership, Section 404 emphasizes the "activity" giving rise to the discharge of dredged material, which further distinguishes the two sections. *See, e.g.*, 33 U.S.C. § 1344(e)(1) (stating the EPA may issue permits for "any categories of activities involving discharges of dredged or fill material"); *id.* at § 1344(f)(2) (must obtain permit for discharge incidental to "any activity" altering the use of navigable waters). Waukesha County engaged in no "activity" whatsoever.

And finally, the term "discharge of any pollutant" that appears in Section 402 must be understood as defined elsewhere in the Act. *See* 33 U.S.C. § 1362(12) ("the addition of any pollutant to navigable waters from any point source"). The introduction of "point source" into the statutory scheme to define "discharge" and give context to "addition" can only mean that we look to whether the point source is actively adding pollutants to navigable waters. And if the point source is "discharging," the "person" who owns or operates the point source is liable under the Act. In this respect, our holding is not inconsistent with *Froebel*. There, in fact, the court specifically held that the county was not liable under Section 402 because the

removed dam was not a point source. *Froebel*, 217 F.3d at 937 (holding that removed dam was not a "point source" because that term "connotes the terminal end of an artificial system for moving water, waste, or other materials"). Here, in contrast, El Paso has conceded that the shaft is a point source.

Thus, we do not find *Froebel* persuasive in this Section 402 case. The better view is that point source owners such as El Paso can be liable for the discharge of pollutants occurring on their land, whether or not they acted in some way to cause the discharge. *See Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980) (noting in dicta that "[n]othing in the Act relieves miners from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water"). This is a case where if you own the leaky "faucet," you are responsible for its "drips."

Our own circuit precedent supports this view. In *United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979), we considered whether the unintentional discharge of pollutants from a gold leaching operation violated the CWA. We found that it did. *See id.* at 374. In reaching this conclusion, we noted that the Act was intended to broadly regulate the introduction of pollutants to streams and rivers. Exempting point source owners without a clear exemption from Congress from the requirement to obtain NPDES permits for discharges occurring on their land would undermine a primary objective of the Act. 33 U.S.C. § 1251(a)(1) and (3) (declaration of Congress's goals and policies).

In sum, we hold that point source owners can be liable under Sections 301(a) and 402 of the CWA for unpermitted discharges that occur from their land even if they are not actively mining their property. The magistrate judge, therefore, did not err in holding that El Paso could be liable for discharges occurring at the El Paso shaft.

C. Hydrological Connection Between El Paso Shaft and Roosevelt Tunnel Portal

The final issue before us focuses on fact questions. Did the magistrate judge err in granting summary judgment for the Plaintiffs by finding that the undisputed facts established a hydrological connection between the El Paso Shaft and the Roosevelt Tunnel portal?

We review the grant of summary judgment de novo, applying the same standard as the district court. *Ward v. Utah*, 398 F.3d 1239, 1245 (10th Cir. 2005). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c). When applying this standard, we view the evidence and draw all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999) (citations and quotation omitted).

The language of the CWA requires a connection or link between discharged pollutants and their addition to navigable waters. *See* 33 U.S.C. §§ 1311(a), 1362(12). As applied here, Plaintiffs have the burden of establishing

that pollutants, discharged from the El Paso shaft, actually make their way to the Roosevelt Tunnel portal where they are then discharged into navigable waters (Cripple Creek, and, ultimately, the Arkansas River).[6] El Paso argues there were dueling expert opinions regarding the source and path of the pollutants, and, thus, the magistrate judge erred in concluding that Plaintiffs had established the necessary hydrological connection. Plaintiffs counter that any factual uncertainties created by the experts were not material to the issue of El Paso's liability under the CWA, and therefore the magistrate judge correctly concluded there were no genuine issues of material fact. We summarize the relevant evidence below.

1. Plaintiffs' Evidence

Plaintiffs' expert geologist, Kenneth Klco, filed an expert report opining that "at least some of the water that is conveyed from [El Paso's] property, mine, the El Paso shaft, and related underground workings into the Roosevelt Tunnel is discharged into Cripple Creek at the portal of the Roosevelt Tunnel." Aplt. App. III, at 1366. Klco based his conclusion on site inspections and his review of various documents, maps, and photographs of El Paso's property. In June 2001, for example, Klco conducted an exterior inspection of El Paso's property, noting that the El Paso shaft was surrounded by a large waste rock pile and that the property contained "extensive mining disturbances."

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[6] We stress, again, that it is the combination of the El Paso shaft, a point source, and the Roosevelt Tunnel, another point source, that establishes the connection to a navigable stream. This system of infrastructure distinguishes our case from the migration and seepage cases.

Id. at 1367. On this occasion, he also observed discharge from the Roosevelt Tunnel into Cripple Creek, which he described as "continuous." *Id.* In August 2001, Klco again inspected the interior of the Roosevelt Tunnel. His expert report states that he entered the tunnel from the portal and walked the stretch of the tunnel to a point past the El Paso shaft. Klco observed water continuously flowing from the El Paso shaft area all the way to the portal, and when he reached the shaft, he saw water "raining down" from the shaft and related underground workings. *Id.* at 1368. Beyond the El Paso shaft, Klco observed that the tunnel turned to the northwest and there was no longer a continuous flow of water, although there was intermittent pooling of water on the tunnel floor.

In his deposition, Klco explained further that he observed several instances of water seeping into the tunnel via the ribs or roof of the tunnel in the stretch between the portal exit and the El Paso shaft intersection. He also stated that these seeps are potential sources of pollution because water can pick up pollutants – including zinc and manganese – as it travels through faults and fractures in the rock. Additionally, Klco acknowledged that pollutants, once deposited into the tunnel, may not reach the portal because some water exfiltrates into the tunnel floor. Water and pollutants may also be lost due to evaporation and dilution. In his estimation, however, "better than half" of the water and pollution discharged at the portal originate on El Paso's property. Aplt. App. II, at 666-67.

The Plaintiffs hired two other experts as well. Robert Burm, an environmental engineer, opined that "the El Paso shaft and the related underground workings serve as conduits that convey water from [El Paso's] property to the

Roosevelt Tunnel. In turn, the water is then drained by the Roosevelt Tunnel and is finally discharged into Cripple Creek." *Id.* I, at 262. Ann Maest, an aqueous geochemist, rendered a similar opinion: "[I]t is my opinion that at least some of the metals and other contaminants being discharged into Cripple Creek from the Roosevelt Tunnel are generated from the El Paso Mine, El Paso shaft, and related underground workings." *Id.* IV, at 1483. Both of these experts based their conclusions on Klco's examination of the tunnel, as well as other inspection reports, maps, and diagrams.

Among the significant documents the Plaintiffs' experts relied on was an inspection report by Tom Boyce, a CWQCD inspector who inspected the Roosevelt Tunnel in May 1995. According to Boyce's report, water flowed continuously from the El Paso shaft to the portal, but it fluctuated numerous times from lows of approximately two gallons per minute to highs of approximately 15 gallons per minute. Along the two and a half mile stretch from the portal to the El Paso shaft, Boyce observed there were "dozens" of seeps and "water was infiltrating in areas of high porosity and likewise being regenerated by seepage from the walls and ceiling of the tunnel." *Id.* III, at 1423. He also observed that water continued to flow from beyond the El Paso shaft at the same rate and frequency as below the shaft, although the seeps seemed to decrease.[7] Plaintiffs also relied on a January 1995 letter authored by John

[7] John Hardaway, who accompanied Boyce on the May 1995 inspection, filed an affidavit in which he disagreed with Boyce's observation that water continued to flow from above the El Paso shaft. According to Hardaway, the water they encountered above the shaft was due to backed up water coming from the shaft.

Hardaway, the environmental affairs manager from a neighboring mine who had conducted numerous inspections of the Roosevelt Tunnel. According to Hardaway, "the first sign of continuous flow toward the portal in the Roosevelt Tunnel usually occurs at about the tunnel's intersection with the El Paso Mine shaft." *Id.* at 1414.

2. El Paso's Evidence

El Paso's expert, Robert Brogden, is a hydrologist and groundwater geologist. He opined that the Roosevelt Tunnel and its surroundings comprise complex geology that is poorly understood based on current data. He thus criticizes the Plaintiffs' experts for drawing conclusions with respect to the origin and flow of pollutants at the Roosevelt Tunnel portal based on incomplete information. He states, for example, that "pinpointing an exact source or sources of water that flows from the portal is difficult because of the lack of data that adequately describe the geology and hydrology of the area, and the actual movement of ground water. . . . Considerably more data are required before any quantitative conclusions can be drawn as to the exact sources of water flowing from the portal." Aplt. App. II, at 797. Thus, Brogden does not opine there is *no* hydrological connection between the El Paso shaft and tunnel portal; rather, he asserts that the Plaintiffs' experts have no basis to conclude that such a connection exists.

According to Brogden, the geology of the Cripple Creek area is characterized by two distinct units, the "diatreme" and "country rock." The diatreme, which dominates the region, is a mass of rock composed of volcanic breccia. Because the diatreme is relatively permeable, water flows easily and rapidly through open

spaces in the rock. Country rock, on the other hand, is made of granite and other dense forms of rock. Unlike the diatreme, water does not flow freely through the country rock; instead, water only flows through fractures and faults where the rock has been broken. The El Paso shaft is cut into country rock, and the Roosevelt Tunnel cuts through areas of both kinds of rock.

Brogden opined that water discharged from the portal originates from surface precipitation that infiltrates the ground and then moves downward through fractures and faults in the country rock. As water moves downward along the fault lines, it intersects with the El Paso shaft and Roosevelt Tunnel at numerous points. Thus, the Roosevelt Tunnel receives inflow along most of its length, and this water originates from a number of properties that overlie the tunnel. Furthermore, according to Brogden, water in the tunnel infiltrates into the tunnel floor before reaching the portal (especially those portions of the tunnel comprising the diatreme). Accordingly, "water probably enters and leaves the Roosevelt several times between the El Paso Mine shaft and the portal," and "it is likely that a large part of the water (at some times, all of the water) that flows from the portal is derived from water that infiltrates into the tunnel between the El Paso Mine shaft and the portal." *Id.* at 795. In sum, some of the water that may enter the tunnel from the El Paso shaft or upward from it, seep out of the tunnel into the groundwater, never reaching the portal exit.

To further support Brogden's conclusions, El Paso points to a July 2001 memo authored by CWQCD personnel. Although the memo notes "the primary source of water entering the Roosevelt Tunnel is the El Paso shaft where it intersects the Roosevelt," it ultimately concludes,

consistent with Brogden's report, that "more work needs to be done before the responsible parties can be identified." *Id.* I, at 90. And further:

> The full extent of the underground mine workings probably has not been mapped, and the effects of the workings on the hydrology is uncertain because of the limited information. More information is needed about the underground working of the El Paso Mine and any other mines connected to the El Paso along with ownership.

Id. at 91.

El Paso also relies on water sampling data taken from the El Paso shaft in October 1994. The sampling data shows that zinc concentrations in the water decreased dramatically as water flowed towards the portal. Within the first 4,000 feet from the shaft, zinc levels decrease from 4.1 mg/l to .0009 mg/l, representing a 98.85% decrease in less than a quarter of the distance between the shaft and the portal. Approximately half way between the shaft and portal, zinc levels then increased to .916 mg/l. This data, according to El Paso, underscores the complex geology and hydrology of the Roosevelt Tunnel and casts doubt on the Plaintiffs' assertion that pollutants discharged at the portal originate at the El Paso shaft.

3. *Genuine Issues of Material Fact*

In granting Plaintiffs' motion for summary judgment, the magistrate judge found that "[t]he experts agree that some of the polluted water conveyed to the Tunnel by means of the El Paso shaft is discharged at the Tunnel portal on an intermittent basis." Order at 31. Accordingly,

the magistrate judge concluded the evidence was sufficient to demonstrate that El Paso was discharging pollutants into a navigable water from a point source without an NPDES permit.

El Paso argues on appeal that the magistrate judge did not view the facts favorable to the non-moving party, and we agree. Viewed in the proper light, the Plaintiffs have failed to establish the absence of fact issues necessary to show a hydrological connection. Although, as the magistrate judge recognized, the experts agree that at least some of the water from the El Paso shaft reaches the portal, there is no agreement regarding whether *pollutants* coming from the shaft are ever discharged at the portal. It may not be a difficult leap to presume that if water makes the two and a half mile journey, then so do pollutants. But this ignores the evidence showing dramatic declines in zinc levels as water flows from the El Paso shaft toward the portal. It further fails to take into account the apparently complex process of infiltration and exfiltration that occurs along the length of the Roosevelt Tunnel. Even the Plaintiffs' strongest evidence – that water samples at the shaft and the tunnel portal (samples taken by Cripple Creek & Victor Mining Co.) both contain zinc and manganese – is less than convincing given the uncertainties by which the data were collected.[8] Viewed in the light most favorable to the nonmoving party, then, there is a genuine issue of material fact regarding the

[8] *See supra* note 2. The record contains only two water samples taken at the El Paso shaft. Although zinc and manganese were detected, no samples link water from the El Paso shaft to water at the Roosevelt Tunnel portal.

source of pollutants discharged at the portal, and summary judgment was not appropriate.

Our standard for summary judgment bears repeating. At the summary judgment stage, non-movants such as El Paso are given "wide berth to prove a factual controversy exists." *Jeffries v. Kansas Dep't of Soc. & Rehab. Servs.*, 147 F.3d 1220, 1228 (10th Cir. 1998) (quotation omitted). Our role is to assess "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 1228. In this case, the evidence as a whole is not so one-sided that Plaintiffs are entitled to prevail as a matter of law. Nor is this a case where the non-moving party has raised only a "scintilla" of evidence in hopes of creating a factual dispute. *See Simms*, 165 F.3d at 1326. Rather, El Paso has presented compelling and unrebutted evidence that pollutants enter and exit the Roosevelt Tunnel at numerous places along the two and a half mile route from the El Paso shaft to the portal. Whether such evidence stands up under cross-examination or is sufficient to allow El Paso to escape liability is for the trier of fact to decide.

Furthermore, we cannot ignore the larger context of this litigation. Although we do not rely on the findings of the ALJ in the related CWQCD proceedings, we note his observations about the factual complexity of the tunnel geology. Following evidentiary hearings, which included direct expert testimony and cross-examination by both sides, the ALJ found that "[CWQCD] has failed to prove that the zinc and manganese in the water coming out of the Roosevelt Tunnel portal has its origin in the El Paso Mine." Aplt. Supp. App. at 203. Particularly relevant to the ALJ's conclusion was the revelation that reliable

measuring devices and other scientific tools have never been used to determine the flow of water in the Roosevelt Tunnel. The ALJ noted, for example, that although CWQCD employees discussed placing recording weirs in the Roosevelt Tunnel in order to determine how much water was coming down the El Paso shaft, no such device was ever used. Expert testimony also established that a flume – which has never been used – would be another method of recording accurate flows. Nor has any party ever conducted a dye tracing test in order to determine the path of water in the tunnel.[9] The ALJ also noted that CWQCD's expert "does not have objective scientific data to explain why the zinc levels drop so dramatically from the shaft to the portal." *Id.* at 201. As noted above, the Plaintiffs' experts in this case are similarly silent on this point.[10]

Finally, El Paso has asked us to take judicial notice of a recent ruling by the district court in parallel litigation brought by the Plaintiffs against several active mining companies. *See Sierra Club, et al v. Cripple Creek & Victor Gold Mining, Co., supra* note 1. In a hearing held pursuant to Federal Rule of Evidence 702, the district court ruled that Kenneth Klco's expert opinions were inadmissible because "Mr. Klco lacks the qualifications to express the opinions and he has not used a sufficiently reliable

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[9] Counsel for Plaintiffs conceded at oral argument that dye testing, properly conducted, could establish with a high degree of certainty whether pollutants from the El Paso shaft are ultimately discharged at the portal.

[10] On cross-examination, CWQCD's expert testified that the declining levels could be due to dilution of the water by addition of more water into the tunnel or that the zinc could be precipitating out of the water due to changes in pH or changes in the amount of dissolved oxygen.

methodology to formulate them." The opinions offered by Klco in the parallel litigation were essentially identical to those offered here. Nonetheless, our conclusion is based upon our own evaluation of the record before us, and we therefore decline to take judicial notice of the district court's ruling.

III. CONCLUSION

For the aforementioned reasons, we REVERSE and REMAND to the district court for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 01-PC-2163 (OES)

SIERRA CLUB and MINERAL
POLICY CENTER,

Plaintiff(s),

v.

EL PASO GOLD MINES, INC.,

Defendant(s).

MEMORANDUM OPINION AND ORDER

(Filed Nov. 15, 2002)

Patricia A. Coan, United States Magistrate Judge

This is a citizen suit under the Clean Water Act. Jurisdiction exists under 33 U.S.C. §1365(a) and 28 U.S.C. §1331. The parties have consented to determination of this case by a United States Magistrate Judge under 28 U.S.C. §636(c). The matters before the court are Plaintiffs' Motion for Summary Judgment on the Issues of Standing and Liability [filed September 20, 2002] and El Paso Gold Mines, Inc.'s Motion for Summary Judgment [filed September 20, 2002]. The court heard oral argument on November 4, 2002. The motions are ripe for disposition.

Plaintiffs claim that for the last five years and continuing to date, defendant has violated 33 U.S.C. §1311(a) and §1342 of the Clean Water Act by discharging pollutants from a point source into Cripple Creek without a valid permit. Plaintiffs bring suit on their own behalf and on behalf of their members.

I.

A. Statutory framework

The Clean Water Act ("CWA" or "the Act"), 33 U.S.C. §§1251, *et seq.* (2001), was enacted in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). The Act makes it unlawful for "anyone to discharge pollutants into the Nation's waters except pursuant to a permit." *Milwaukee v. Illinois*, 451 U.S. 304, 310 (1987); 33 U.S.C. §1311(a), §1342. "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source."[1] 33 U.S.C. §1362(12). Section 402 of the Act, 33 U.S.C. §1342, establishes a national pollutant discharge elimination system ("NPDES") and directs the EPA to issue permits for the discharge of pollutants in accordance with effluent limitations set by the EPA pursuant to 33 U.S.C. §1312. States are authorized to assume responsibility for administering the NPDES program under the EPA's oversight. 33 U.S.C. §1342(b). Colorado has established an EPA-approved NPDES program. *See* Colorado Water Quality Control Act, at COLO.REV.STAT. ("C.R.S.") §§25-8-501, *et seq.* (2002); 33 U.S.C. §1342(b). The CWA empowers citizens to bring civil actions against any person who fails to comply with the requirements of the CWA or with the terms of an NPDES permit. 33 U.S.C. §1365(a) and (f).

B. Background

The following facts are undisputed. Plaintiff Sierra Club is a national conservation organization "dedicated to exploring, enjoying and protecting the wild places of the

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[1] The terms "pollutant," "point source" and "navigable waters" are defined at 33 U.S.C. §1362(6), (7) and (14).

earth" and "to practicing and promoting the responsible use of the earth's ecosystems and resources." (Compl., ¶7) Plaintiff Mineral Policy Center is a public interest non-profit organization "dedicated to protecting the communities and the environment by preventing the environmental impacts associated with mining and mineral development, and by cleaning up pollution caused by mining." (*Id.*, ¶8)

Defendant El Paso Gold Mines, Inc. ("El Paso") owns the El Paso Gold Mine, El Paso shaft and related mineral rights located in Teller County, Colorado. (Pretrial Order, stipulation n; Amended Answer, ¶¶5, 12) El Paso's property is located within the Cripple Creek Mining District and is included in the mine permit boundary of the Cripple Creek and Victor Gold Mine, an active gold mine permitted by the Colorado Division of Minerals and Geology. (Pretrial Order, stipulation j; Amended Answer, ¶¶17, 18) The Mining District contains underground tunnels, shafts, drains, adits, laterals, mine workings, stopes and pipes. (Amended Answer, ¶20) The Roosevelt Tunnel is a six-mile man-made underground tunnel that was constructed to drain water from mines in the Cripple Creek Mining District. (Pretrial Order, stipulation e; Amended Answer, ¶¶21-22) The El Paso shaft is connected to the Roosevelt Tunnel. (Pretrial Order, stipulation g) A series of underground mine workings are connected to the El Paso shaft. (Plaintiffs' Ex. 11, *Expert Report of Robert Brogden*, Appendix D) Samples taken from water flowing into the Roosevelt Tunnel from the El Paso shaft contain zinc and manganese. (Plaintiffs' Ex. 3, *El Paso Gold Mines, Inc.'s Answer [to Notice of Violation/Cease and Desist Order] and Request for Hearing*, ¶9; Plaintiffs' Exs. 23, 24 and 58, *water sample reports*)

Multiple properties, including defendant's property, overlie, connect to, and are drained by the Roosevelt Tunnel. (Pretrial Order, stipulations f, g and h; Amended Answer, ¶¶22, 44) The Roosevelt Tunnel portal is located along the Shelf Road, County Road 88 in Teller County. (Pretrial Order, stipulation i; Amended Answer, ¶40) The Roosevelt Tunnel portal discharges water into Cripple Creek. (Plaintiffs' Ex. 3, ¶6) Cripple Creek is a tributary of Fourmile Creek, which is a tributary of the Arkansas River. (*Id.*) Samples taken from the water flowing from the Roosevelt Tunnel portal into Cripple Creek contain zinc and manganese. (Pretrial Order, stipulation o; Plaintiffs' Ex. 3, ¶10; Defendant's Amended Answer, ¶24) Some of the water which enters the Roosevelt Tunnel from the El Paso shaft is released into Cripple Creek at the Roosevelt Tunnel portal. (Plaintiffs' Exs. 17, 30, *Affidavit and Expert Report of Kenneth Klco*; Defendant's Ex. A-8(A) and (B), *Affidavit, Expert Report and Rebuttal Report of Robert E. Brogden*) Defendant does not have an NPDES permit to discharge pollutants from the El Paso shaft and Roosevelt Tunnel into Cripple Creek. (Pretrial Order, stipulation k; Amended Answer, ¶47)

II.

The parties have filed cross motions for summary judgment concerning the defendant's liability for violating the CWA. Plaintiffs also move for summary judgment on their constitutional standing to bring this action.

The purpose of summary judgment is to determine whether trial is necessary. *White v. York Int'l. Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). Summary judgment is appropriate under Fed.R.Civ.P. 56(c) when the "pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The movant bears the initial burden to "point to those portions of the record that demonstrate an absence of a genuine issue of material fact given the relevant substantive law." *Thomas v. Wichita Coca-Cola Bottling* Co., 968 F.2d 1022, 1024 (10th Cir. 1992). If this burden is met, the nonmovant must "come forward with specific facts showing that there is a genuine issue for trial as to elements essential to [the nonmovant's claim]." *Martin v. Nannie and the Newborns, Inc.*, 3 F.3d 1410, 1414 (10th Cir. 1993) (internal citations omitted). The nonmovant has the burden to show that there are genuine issues of material fact to be determined. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The court views the evidence of record and draws all reasonable inferences in the light most favorable to the nonmovant. *Thomas v. International Business Machines*, 48 F.3d 478, 484 (10th Cir. 1995). To defeat a properly supported motion for summary judgment, "there must be evidence upon which the jury could reasonably find for the plaintiff." *Panis v. Mission Hills Bank, N.A.*, 60 F.3d 1486, 1490 (10th Cir. 1995) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). Conclusory allegations will not create a genuine issue of material fact necessitating trial. *White*, 45 F.3d at 363.

On cross motions for summary judgment, the court may assume that no evidence other than that submitted by the parties need be considered; however, summary judgment is inappropriate if disputed issues of material fact remain. *James Barlow Family Ltd. Partnership v.*

David M. Munson, Inc., 124 F.3d 1321, 1323 (10th Cir. 1997) (internal citation omitted).

III.

A. Article III Standing

Plaintiffs move for summary judgment on their standing to bring this citizen suit under Article III of the Constitution. Plaintiffs sue on their own behalf, as public interest organizations, and on behalf of their members.

Under Article III of the Constitution, a federal court may only adjudicate an actual case or controversy. The purpose of the standing requirement is to determine "[w]hether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of the controversy." *Sierra Club v. Morton*, 405 U.S. 727, 730 (1972). The party seeking to invoke the federal court's jurisdiction bears the burden of establishing standing. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). Plaintiffs must have standing at all stages of the litigation, *see National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994), and plaintiffs bear the burden of proving it "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Here, because plaintiffs move for summary judgment, they must submit evidence to prove each element of standing and if the evidence is controverted, the matter cannot be decided on summary judgment. *Id.*

An organization has standing to bring suit on behalf of its members if: (1) the organization's members would have standing to sue on their own; (2) the interests the

organization seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires individual participation by its members. *Friends of the Earth v. Laidlaw,* 528 U.S. 167, 181 (2000) (citing *Hunt v. Washington Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977)).

An organization's members have standing to sue on their own if the members have suffered, or are likely to suffer, an injury in fact which can fairly be traced to the conduct of the defendant and which is likely to be redressed by a favorable decision. *Lujan,* 504 U.S. at 560-61; *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 472 (1982). It is enough for the organization to show that one of its members has individual standing. *Sierra Club v. Cedar Point Oil Co., Inc.* (*"Cedar Point Oil"*), 73 F.3d 546, 558, n.24 (5th Cir. 1996); *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1113 (4th Cir. 1988).

Harm to aesthetic, recreational and environmental interests is proof of an injury in fact. *Sierra Club v. Morton,* 405 U.S. at 734. The quantity of the injury is not important; an "identifiable trifle" will suffice. *United States v. Students Challenging Regulatory Agency Procedures,* 412 U.S. 669, 689, n. 14 (1973). To sustain a CWA action, an individual's interest in eliminating effluents discharged into a water body must be more than the concern shared by any bystander. *See Sierra Club v. Morton,* 405 U.S. at 734-35; *Cedar Point Oil,* 73 F.3d at 556. The individual must demonstrate a connection with the water body that is the subject of the CWA suit. *Id.* Threat of future injury is sufficient. *Valley Forge,* 454 U.S. at 472.

Plaintiffs proffer affidavits from organizational members who state that they recreate along the "Gold Belt Tour," a road in the Cripple Creek Mining District which follows Cripple Creek past the Roosevelt Tunnel portal almost to the confluence of Fourmile Creek. (Affidavits of Marilyn Fay, Dan Randolph, Marshall Winblood, Bill Clymer, and Kirby Hughes, Plaintiffs' Exs. 39, 40, 41, 42 and 43) The members aver that their enjoyment of the Gold Belt Tour is diminished because of the minimal amount of aquatic life in Cripple Creek and the reduction in the quality of fishing in recent years. (Randolph and Winblood Affidavits) Ms. Fay does not allow her grandchildren to play in Cripple Creek as she used to because of concern about the level of toxicity in the water from mine drainage. (Fay Affidavit) The organizational members are concerned that pollutants contained in the unpermitted discharges into Cripple Creek will adversely affect aquatic life and wildlife in the area. (Randolph, Winblood, Clymer and Hughes Affidavits)

I find and conclude that plaintiffs have satisfied the injury in fact requirement for Article III standing based on the evidence that their members are concerned about the effects of the discharges from the Roosevelt Tunnel into Cripple Creek and that those discharges directly affect their recreational and aesthetic interests. *Friends of the Earth*, 528 U.S. at 182-83; *see, also, Lujan*, 504 U.S. at 562-63 ("[T]he desire to use or observe animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing.").

To satisfy the fairly traceable prong, plaintiffs need not demonstrate to a scientific certainty that defendant's discharge is solely responsible for the harm suffered. *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.* ("*Powell Duffryn*"), 913

F.2d 64, 72 n. 8 (3rd Cir. 1990). Plaintiffs must show that defendant has (1) discharged some pollutant without a permit, or in concentrations greater than allowed by its permit, (2) into a waterway in which the plaintiff has an interest that is or may be adversely affected by the pollutant, and (3) that this pollutant causes or contributes to the kinds of injuries alleged by the plaintiff. *Id.*, at 72; *Cedar Point Oil*, 73 F.3d at 558; *see, also, Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161-62 (4th Cir. 2000).

Plaintiffs have produced evidence that the El Paso shaft, which is located on property owned by defendant, carries water containing pollutants (zinc and manganese) to the Roosevelt Tunnel and that the Roosevelt Tunnel portal discharges the same pollutants into Cripple Creek. The evidence is uncontroverted that at least some of the water that enters the Tunnel from the El Paso shaft flows to the Tunnel portal and into Cripple Creek. (*Expert Reports of Kenneth Klco and Robert E. Brogden*) Zinc is a known aquatic toxin. (Plaintiffs' Exs. 21 and 61, *Affidavit and Expert Report of Ann Maest, PhD*, ¶7) Plaintiffs thus have sufficiently demonstrated, under the *Powell Duffryn* test, that El Paso has discharged a pollutant (or pollutants) without a permit into Cripple Creek, a waterway in which Sierra Club and Mineral Policy Center members have an interest, and that pollutants in that water threaten the number of aquatic species in Cripple Creek. I find and conclude that plaintiffs have demonstrated that their stated injuries are fairly traceable to the defendant's unpermitted discharges.

Redressability focuses on the plaintiff's injury and the judicial relief sought. Plaintiffs seek declaratory and injunctive relief, civil penalties, and their litigation costs

and attorney fees. Under 33 U.S.C. §1365(a)(1), district courts have jurisdiction to issue injunctive relief to enforce an effluent standard or limitation[2] and to assess any appropriate civil penalties under 33 U.S.C. §1319(d). The court may also award a prevailing party in a citizen suit its costs and attorney fees. 33 U.S.C. §1365(d). The statutory remedies can redress the harms alleged by plaintiffs and their members. *See Friends of the Earth*, 528 U.S. at 185-86. Further, the issuance of civil penalties serves to deter defendant from future violations of the CWA. *Id.*

I find and conclude as a matter of law that plaintiffs have Article III standing to bring this citizen suit on behalf of themselves and their members. Plaintiffs have adduced unrebutted evidence to prove an injury in fact to their recreational interests, which fairly can be traced to El Paso's discharges of pollutants into Cripple Creek without an NPDES permit, and which is redressable by the requested relief.

B. Subject Matter Jurisdiction: "Ongoing Violation" Requirement

Defendant argues that the court lacks subject matter jurisdiction over this citizen suit because the residual effects of past mining activity on defendant's property are not actionable as an ongoing violation of the CWA.

Section 505 of the CWA confers jurisdiction over citizens suits brought against any person "alleged to be in

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[2] The phrase "effluent standard or limitation" includes, *inter alia*, "an unlawful act under section 1311 or 1312 of this title;" and "a permit or condition thereof issued under section 1342 of this title . . . " 33 U.S.C. §1365(f).

violation of" the Act. 33 U.S.C. §1365(a). In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 64 (1987), the Supreme Court held that Section 505 does not permit a citizen suit based on "wholly past violations." At the pleading stage, the plaintiff must make a good faith allegation of a continuing or intermittent violation on the date the complaint is filed. *Id.* On summary judgment, there must be sufficient evidence in the record to support a finding by the trier-of-fact that defendant engaged in continuing or intermittent violations of the CWA after suit was filed, or that there was a continuing likelihood that intermittent or sporadic violations would recur. *See Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1311 (2nd Cir. 1993); *Natural Resources Defense Council v. Texaco Refining*, 2 F.3d 493, 501 (3rd Cir. 1993); *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.* (*Gwaltney II*), 844 F.2d 170, 171-72 (4th Cir. 1988) (per curiam); *Carr v. Alta Verde Indust., Inc.*, 931 F.2d 1055, 1062 (5th Cir. 1991); *Sierra Club v. Union Oil Co. of Calif.*, 853 F.2d 667, 671 (9th Cir. 1888).

Defendant relies on *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392, 397 (5th Cir. 1985) in support of its position that plaintiffs have failed to demonstrate an ongoing violation of the CWA. In *Hamker*, plaintiffs brought a citizen suit against the defendant after a pipeline leaked 2400 barrels of crude oil into the soil and a creek. The *Hamker* plaintiffs argued that the residual effects of the leak threatened groundwater because of continuing seepage. The Fifth Circuit dismissed the complaint because plaintiffs had failed to allege a continuing addition of pollutants to groundwater from a point source. *Id.* at 397. The court held that "[m]ere continuing

residual effects resulting from a [past] discharge are not equivalent to a continuing discharge." *Id.*

Defendant also relies on *Connecticut Coastal Fishermen's Ass'n*, 989 F.2d 1305. There, the alleged discharger was a trap and skeet shooting club which had deposited tons of lead shot and millions of pounds of clay target fragments on the land around the club and in the adjacent waters of Long Island Sound over a seventy-year period. The court granted summary judgment in favor of defendant in plaintiff's citizen suit because defendant had ceased operation of the gun club by the time plaintiff commenced its action. 989 F.2d at 1312, 1313. The Second Circuit concluded that there was no reasonable likelihood that defendant would discharge lead shot in the future. *Id.* at 1312. The court rejected plaintiff's argument that the lead shot previously deposited in the water was a point source discharging pollutants as it dissolved. *Id.* at 1313. The court stated that "[t]he present violation requirement of the Act would be completely undermined if a violation included the mere decomposition of pollutants." *Id.; see, also, Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F.Supp. 1333, 1354 (D.N.M. 1995) (stating that "[m]igration of residual contamination resulting from previous releases is not an ongoing discharge within the meaning of the [Clean Water] Act"); *Wilson v. Amoco Corp.*, 33 F.Supp.2d 969, 975 (D.Wyo. 1998) (holding that presence of PCE contaminants in groundwater from past operations which migrated to North Platte River did not support a CWA citizen suit and stating that "only in rare circumstances will an ongoing CWA violation exist when the facilities from which the contaminants are emanating have themselves ceased operating"); *Aiello v. Town of Brookhaven*, 136 F.Supp.2d 81 (E.D.N.Y. 2001) (holding

that a past polluter cannot be held liable for ongoing discharges when a pollutant previously added to groundwater continues to reach a navigable water); *but see Werlein v. United States*, 764 F.Supp. 887, 896-897 (D.Minn. 1990) (holding that past discharge of toxic waste into the soil was a ongoing violation of the CWA where toxic waste was being introduced to a waterway over time by rainwater infiltration), *vacated in part on other grounds*, 793 F.2d 898 (8th Cir. 1992).

Plaintiffs argue that the CWA regulates the ongoing discharge of pollutants from a point source into waters of the United States whether or not the point source discharge is the result of present or past industrial activity. Plaintiffs rely on *Umatilla Waterquality Protective Ass'n, Inc. v. Smith*, 962 F.Supp. 1312, 1322 (D.Or. 1997). In that case, the district court held that, assuming discharges of pollutants through hydrologically-connected groundwater are subject to regulation under the CWA, a discharge of residual pollutants collected in an unlined brine pond is an ongoing discharge from a point source, "even if the discharger is no longer adding pollutants to the point source itself." 962 F.Supp. at 1322. The court reasoned that the focus of the CWA is "on whether the pollutants reach navigable waters from a point source." *Id.*

The cases cited by El Paso are inapplicable here because the factual circumstances did not involve an ongoing discharge of pollutants from a point source into navigable waters. Instead, the continuing migration of pollutants into navigable waters was occurring because of a *past discharge* from a point source. Here, the evidence is that the El Paso shaft carries polluted water to the Roosevelt Tunnel and some of that polluted water flows from the Roosevelt Tunnel portal into Cripple Creek.

In Section III.C, *infra*, I find and conclude that defendant's discharges from the El Paso shaft are subject to CWA regulation and that El Paso has violated the Act. The evidence further demonstrates a continuing likelihood of a recurrence in intermittent or sporadic violations of the Act. "Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition." *Gwaltney II*, 890 F.2d at 693; *see, also, Sierra Club v. Union Oil Co. of California*, 853 F.2d at 671; *Carr*, 931 F.2d at 1062. Reports of inspections from the interior of the Roosevelt Tunnel in the 1990's and in 2001 show that the El Paso shaft contributes to the flow that is discharged from the Tunnel portal. *See* discussion *infra*, Section III.C.4. Moreover, defendant admits that "it has taken no action to . . . reduce pollutant concentrations in the effluent flow from the Roosevelt Tunnel." (*Amended Answer*, ¶42) Because there is no evidence that El Paso's intermittent or sporadic violations of the CWA are not likely to recur, I find and conclude that I have subject matter jurisdiction over this citizen suit.

C. Liability

To establish a violation of the CWA, plaintiffs must prove that El Paso: (1) discharged ("added"), (2) a pollutant, (3) into navigable waters, (4) from a point source, (5) without a permit. 33 U.S.C. §1311(a), §1362(12); *Committee to Save Mokelumne River v. East Bay Mun. Util. District*, 13 F.3d 305, 308 (9th Cir. 1993); *Nat'l Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C.Cir. 1982).

Defendant, a corporation, is a "person" subject to the permitting requirements of the Act. 33 U.S.C. § 1362(5). Defendant concedes that the zinc and manganese contained

in water samples taken from the El Paso shaft and the Roosevelt Tunnel portal are "pollutants" as defined by the Act.[3] (Plaintiffs' Ex. 3, ¶¶9-11); *see, also, Committee to Save Mokelumne River*, 13 F.3d at 308 (stating that acid mine drainage is a "pollutant" under the CWA) Defendant also concedes that it does not have a discharge permit. (Pretrial Order, stipulation k)

1. Point source

Defendant argues that the Roosevelt Tunnel is not a point source because water infiltrates into and exfiltrates out of the Tunnel along its six-mile length. Plaintiffs contend that the El Paso shaft, related mine workings and the Roosevelt Tunnel are "point sources" as defined by the CWA.

The CWA defines "point source" as

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

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[3] The term "pollutant" includes dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954 . . .), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. 33 C.F.R. 122.2; *see, also,* C.R.S. §25-8-103(15)(2002) (setting forth substantially similar definition of pollutant).

33 U.S.C. §1362(14). "The concept of a point source was designed to . . . embrac[e] the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979).

The term "tunnel" is expressly included within the Act's definition of "point source." The Roosevelt Tunnel is a six-mile man-made tunnel designed and built to drain water from mining operations in the Cripple Creek Mining District. The evidence shows that water flows exiting the Tunnel into Cripple Creek contain pollutants. Accordingly, I find and conclude that the Roosevelt Tunnel is a point source as defined by the CWA. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 493 (2d Cir. 2001) (concluding that water diversion tunnel was a point source.)

The El Paso shaft and mine workings are man-made conveyances which carry pollutants into the Roosevelt Tunnel. (*Expert Report of Ann Maest*) Plaintiffs' expert geochemist, Ann Maest, opines that the El Paso shaft and related underground mine workings contain minerals that release metals and other contaminants into the infiltrating precipitation flowing through the underground workings and the El Paso shaft. (*Maest Report*) The El Paso shaft discharges the polluted water into the Tunnel. (*Id.*) Further, the EPA's position is that abandoned and active mine adits and mine workings are point sources. (Plaintiffs' Exs. 48 and 58, *December 22, 1993 Letter from Max Dodson, Director of the Water Management Division of Region VIII of the EPA to Montana Department of Health*)

Although the EPA policy statement is not entitled to *Chevron*[4] deference, agency interpretations in opinion letters are "entitled to respect" to the extent those interpretations have the "power to persuade." *Christenson v. Harris County*, 529 U.S. 576, 587 (2000). Because the EPA's interpretation of a "point source" is consistent with *Earth Sciences, Inc.*, I join the other district courts which have found it persuasive. *See Beartooth Alliance v. Crown Butte Mines,* 904 F.Supp. 1168, 1175 (D.Mont. 1995); *Gill v. LDI*, 19 F.Supp.2d 1188, 1196-97 (W.D. Wa. 1998); *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F.Supp. 983, 988-89 (E.D.Wash. 1994). Accordingly, I find and conclude that the El Paso shaft and any mine workings connected to the El Paso shaft are "point sources."

2. "Navigable waters"

Defendant next contends that Cripple Creek is not a "navigable water" because it is not "navigable in fact."

The term "navigable waters" means "waters of the United States." 33 U.S.C. §1362(7). "Waters of the United States" has been defined very broadly to include all waters susceptible to use in interstate commerce; all interstate waters; all other waters the use or degradation of which could affect interstate or foreign commerce, including waters which could be used by interstate or foreign travelers for recreational purposes, waters from which fish are or could be taken and sold in interstate or

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[4] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). In *Chevron*, the Supreme Court held that a court must give effect to an agency's regulation that reasonably interprets an ambiguous statute.

foreign commerce, or waters which could be used for industrial purposes in interstate commerce; all impoundments of waters which otherwise meet the definition of "waters of the United States"; and tributaries of waters which meet the definition of "waters of the United States." 40 C.F.R. §122.2.

A water receiving pollutants need not be navigable in fact to be regulated by the CWA. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). The requirements of the Act are met if the receiving water is hydrologically connected to a water which meets the definition of "waters of the United States," even if the receiving water flows on an intermittent basis. *Quivera Mining Co. v. United States EPA*, 765 F.2d 126, 129 (10th Cir. 1985) (concluding that arroyos and creek beds carrying water on an intermittent basis are protected by the Act); *see, also, United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979) (stating that the Act covers tributaries of "waters of the United States," even if the tributary does not flow continuously).

I take judicial notice that the Arkansas River is an interstate water. Defendant concedes that Cripple Creek is a tributary of Fourmile Creek, which is a tributary of the Arkansas River. (Plaintiffs' Ex. 3, ¶6) A "tributary" is a "stream which contributes its flow to a larger stream or other body of water." RANDOM HOUSE COLLEGE DICTIONARY 1402 (rev. ed. 1980). Thus, by definition, a tributary of a river is hydrologically connected to that

river. Accordingly, I find and conclude that Cripple Creek is a navigable water as defined by the CWA.[5]

3. Discharge (i.e., "addition")

Defendant also maintains that it is not subject to the Act's permitting requirements because it is a "passive"

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[5] Defendant also argues that the CWA's regulation of pollutants discharged into "navigable waters" was restricted by the Supreme Court's decision last year in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001). There, the Court invalidated a 1986 Army Corps of Engineers' "Migratory Bird Rule," which defined "waters of the United States" to include intrastate waters with no connection to any navigable waters, but which were or would be used as habitat by migratory birds. *See* 51 Fed. Reg. 41206, 41217 (1986) (setting out Corps' interpretation). The Court rejected the Corps' argument that "isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under [the] definition of 'navigable waters' because they serve as habitat for migratory birds." 531 U.S. at 171-72. The Supreme Court held that the Corps' interpretation exceeded its authority under the CWA and "result[ed] in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174.

Solid Waste did not invalidate the EPA's regulation defining "waters of the United States" to include tributaries of interstate or navigable waters. *See Idaho Rural Council v. Bosma*, 143 F.Supp.2d 1169, 1178 (D.Idaho 2001) ("Though the Supreme Court [in *Solid Waste*] has recently articulated its unwillingness to read the term 'navigable' entirely out of the CWA, it also made clear that waters of the United States include at least some waters that are not navigable in the classical sense, such as non-navigable tributaries and streams."); *United States v. Interstate General Co.*, 152 F.Supp.2d 843, 847 (D.Md. 2001) (describing *Solid Waste* as "a narrow holding" limited to the Migratory Bird Rule and not affecting regulations defining navigable waters to include non navigable tributaries and streams); *Aiello*, 136 F.Supp.2d at 119 (holding that "non-navigable tributaries of navigable waters [are] waters of the United States under the CWA"); *California Sportfishing Protection Alliance v. Diablo*, 209 F.Supp.2d 1059, 1075 (E.D.Cal. 2002) (stating that *Solid Waste* "does not alter the rule that tributaries are 'navigable waters' under the Act.")

owner of a historic mining property. Plaintiffs argue that the CWA proscribes any discharge from a point source without a permit, whether or not the landowner has engaged in affirmative action to cause the discharge.

The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §1362(12). The Act does not define the term "addition" and the legislative history is silent about the term's meaning. *See Catskill Mountains Chapter of Trout Unlimited*, 273 F.3d at 493; *National Wildlife Federation v. Gorsuch*, 693 F.2d at 175; *see, also*, S.Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668. The federal regulations EPA promulgated provide that "any addition of any pollutant" includes "additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works." 40 C.F.R. §122.2.

El Paso does not contend that point source discharges at inactive mine sites are entirely exempt from NPDES regulation. Indeed, the case law is to the contrary. *See Committee to Save Mokelumne River*, 13 F.3d at 308-09 (holding district liable in citizen suit for unpermitted point source discharges based on the district's channeling of mine drainage from an abandoned mine site into a man-made facility which was then released over the dam's spillway or through its valve into a river); *Beartooth Alliance*, 904 F.Supp. at 1172-74 (holding that man-made adit and pits on "abandoned" mine sites that discharged mine drainage into creeks were point sources regulated by

the CWA); *see, also, American Mining Congress v. U.S. EPA*, 965 F.2d 759, 767 (9th Cir. 1992) (holding that EPA could require stormwater discharge permits for inactive mining operations and stating that "[a]ll point sources that discharge pollutants, including point sources that discharge pollutants from inactive mines, require a permit."). Moreover, the EPA has issued a policy statement that "discharges from mine adits at historic or active mines [including seeps and other groundwater discharges hydrologically connected to surface water from mines] are point sources and are required to have an NPDES permit if pollutants are being discharged to waters of the United States." (Plaintiffs' Exs. 48, 58).

El Paso argues however, that the CWA does not regulate point source discharges from inactive mines in the absence of an affirmative act by the property owner to facilitate the discharge. It is undisputed that defendant has never engaged in mining operations on the El Paso gold mine property[6] and did not construct the El Paso shaft, related mine workings, or the Roosevelt Tunnel. *Committee to Save Mokelumne River* and *Beartooth Alliance* are therefore factually distinguishable from the instant action because the defendants in those cases had been engaged in active mining operations on the

[6] I note the evidence that a representative from Cripple Creek & Victor Gold Mine Company drilled three holes in the ground near the El Paso shaft in 1991 or 1992 without any follow up activity. (*See* Plaintiffs' Ex. 7, *Affidavit of Dudley K. Wiltse, Jr.*; Defendant's Ex. 11, *Affidavit of Jeff Pontius*) However, I do not consider this single incident to constitute mining activity of any significance.

abandoned mining property or had participated in the construction of the point source.[7]

Defendant cites *Froebel v. Meyer*, 217 F.3d 928 (7th Cir. 2000) in support of its position that mere ownership of property does not require an NPDES permit. *Froebel* involved a citizen suit against the State of Wisconsin and Waukesha County under Section 404 of the CWA, 33 U.S.C. §1344. The State removed a dam built in 1850 and the plaintiff alleged that water passing through the opening where the dam used to be scoured silt and sediment off the bottom of the impoundment and deposited it downstream. The County did not participate in the dam removal, but owned the property where the dam had been located. The Seventh Circuit dismissed the County as a defendant because a landowner who "do[es] absolutely nothing at all" is not obligated to comply with the Act's Section 404 dredge and fill permit requirements. 217 F.3d at 938. The CWA defines "discharge of dredged material" as "any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States." 33 C.F.R. §323.2(d)(1). A "discharge of fill material" is "the addition

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[7] In *Committee to Save Mokelumne River*, the East Bay Municipal District acquired a portion of an abandoned mine property to build a reservoir. The District constructed a dam, surface impoundment, drainage ditches, pipes, culverts and channels ("the Penn Mine facility") to capture contaminated surface runoff flowing through the mine site and to reduce the threat of continued toxic runoff. Occasionally, polluted water that collected in the Penn Mine facility passed over the spillway or through the dam's discharge valve into the Mokelumne River and the reservoir.

In *Beartooth Alliance*, defendants Crown Butte Mines and Crown Butte Resources owned or had operated the abandoned adit and pits when the site was an active mine.

of fill material into waters of the United States." 33 C.F.R. §323.2(f). The court concluded that "the reference to 'addition' and 'redeposit' strongly suggest that a Section 404 permit is required only when the party allegedly needing a permit takes some action, rather than doing nothing whatsoever [except continuing to own the land]." 217 F.3d at 938. The Seventh Circuit emphasized that plaintiff had not demonstrated that "dredging can be a purely passive activity." *Id.* at 938.[8]

Defendant maintains that Congress intended the same meaning of "discharge" (i.e., "addition") in Sections 402 and 404 of the Act; thus, under *Froebel*, a passive landowner cannot be held liable for violation of Section 402.[9] *See Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479 (1998) (recognizing the canon of statutory construction that similar language within the same statutory section must be accorded a consistent meaning)

I do not agree that the standard for imposing liability under the CWA is the same under Sections 402 and 404. Liability under Section 402 is premised on the ownership or operation of a point source. The CWA consistently refers to a "point source" and to the obligations imposed on an owner or operator of a point source. *See, e.g.*, 33 U.S.C.

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[8] The Seventh Circuit also rejected plaintiff's claim against the County for violation of Section 402 of the CWA because the former dam impoundment and the unrestored river channel where the dam used to be did not constitute a point source. *Froebel*, 217 F.3d at 937-38.

[9] The CWA states: "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342 and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. §1311(a). (Emphasis supplied.)

§1311(e) (requiring that effluent limitations established under the Act "be applied to all point sources of discharge of pollutants"); §1311(g)(2) (allowing "owner or operator of a point source" to apply to EPA for modifications of limitation requirements for certain unconventional pollutants); §1314(b)(4)(B) (denoting "best conventional pollutant control technology measures and practices" applicable to any point source within particular category or class); §1318(a) (requiring "owner or operator of any point source" to establish and maintain records, install and maintain monitoring equipment, and sample effluents); §1342(f) (directing EPA to promulgate regulations establishing classes, categories, types, and sizes of point sources). "Owner or operator means the owner or operator of any 'facility or activity' subject to regulation under the NPDES program." 40 C.F.R. 122.2. "Facility or activity means any NPDES 'point source' or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program." *Id.* The Act regulates discharges of pollutants from a point source and makes the owner responsible for those discharges.[10] The EPA, through its implementation authority, issued regulations equating "activity" with the point source. Nothing in the CWA or the implementing regulations requires that the owner of a point source engage in any activity to facilitate the discharge from the point source. Accordingly,

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[10] If the point source is owned by one person, but operated by another, the operator is responsible for obtaining a permit. 40 C.F.R. §122.21(b). Here, El Paso, the owner of the El Paso shaft and connected underground mine workings, is responsible for unpermitted discharges of pollutants from those point sources because there is no "operator."

Froebel is not persuasive authority in this Section 402 case.[11]

I find the Fifth Circuit's decision in *Sierra Club v. Abston Const. Co., Inc.*, 620 F.2d 41 (5th Cir. 1980) instructive on the issue of whether a so-called "passive" owner of a point source at an inactive mine site is required to comply with Section 402 of the Act. In *Abston*, the defendants created pits and spoil banks during their active mining operations which eroded during rainwater runoff and carried polluted water to Daniel Creek. The defendants argued that they were not required to obtain an NPDES permit because they had not engaged in any affirmative act to effect a discharge. The Fifth Circuit rejected the defendants' argument because "[t]he ultimate question is whether pollutants were discharged from 'discernible, confined, and discrete conveyance(s)' either by gravitational or nongravitational means." 620 F.2d at 45.

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[11] Defendant also relies on the following language in *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) in support of its position that Congress' use of the word "addition" contemplates affirmative activity: "Had Congress wanted to use CWA §402 to regulate all sources of pollution, 'it would easily have chosen suitable language, e.g., all pollution released through a point source.' . . . Instead, Congress chose the word 'addition.'" 862 F.2d at 586 (quoting *Gorsuch*, 693 F.2d at 176) (internal quotation omitted). In *Consumers Power Co.* and *Gorsuch*, the Sixth Circuit held that water quality changes caused by a dam did not constitute the "addition" of pollutants to a water of the United States. The Sixth Circuit adopted the EPA's construction that an "addition" requires the physical introduction of a pollutant into water from the outside world. *Gorsuch*, 693 F.2d at 175; *Consumers Power Co.*, 862 F.2d at 584. *Gorsuch* and *Consumers Power Co.* involved water quality changes resulting from the impoundment and recirculation of water and do not offer any support for El Paso's position in this case that a "passive owner" of a point source is not obligated to comply with Sections 301 and 402 of the CWA.

The Fifth Circuit held that surface runoff collected or channeled by the operator constituted a point source discharge. In addressing liability under the Act, the Fifth Circuit stated: "Nothing in the Act relieves miners from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water." 620 F.2d at 45. I concur with the *Abston* decision which recognizes, albeit in dicta, that ownership of a point source, without more, is enough to trigger liability under the CWA if the point source is the means by which pollutants enter waters of the United States.

El Paso maintains that if Congress intended to regulate based on ownership of property only, it would have expressly stated as much by proscribing the "movement" or "drainage" of pollutants, rather than using the term "addition" which implies affirmative conduct. Defendant contrasts CERCLA[12] wherein Congress imposed liability on any owner or operator for a "release" of a hazardous substance through "leaking," "escaping," and "leaching." 42 U.S.C. §9601(22).[13] Defendant thus argues that the EPA has exceeded its statutory authority to the extent that the

[12] Comprehensive Environmental Resource, Compensation and Liability Act of 1980, 42 U.S.C. §§9601, *et seq.* (1995).

[13] CERCLA makes liable "the owner and operator of a . . . facility" from which there is a release or a threatened release of a hazardous substance. 42 U.S.C. § 9607(a). "Facility" means a structure or "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed." 42 U.S.C. §9601(9). "Release" includes "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . ." 42 U.S.C. §9601(22).

EPA Region VIII policy statement regulating the discharge of pollutants from inactive mines purports to impose liability on "passive" landowners. *See Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981) (stating that judiciary must reject administrative constructions of the statute that are "inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.")

Defendant's arguments fail to persuade me. The key to liability under the CWA is the ownership or operation of a point source which "adds" pollutants to navigable waters. A point source "adds" pollutants by conveying, releasing, spilling, overflowing, seeping or leaching the pollutants into navigable waters. *See, e.g., Earth Sciences, Inc.*, 599 F.2d at 373-74 ("escape" of polluted water from a sump pit, through "overflow" or from a "fissure in the dirt berm"); *Abston Construction Co.*, 620 F.2d at 45 (sediment basin overflow); *Committee to Save Mokelumne River*, 13 F.3d at 308-09 (pollutants conveyed through dam's discharge valve and overflowing the dam's spillway); *Washington Wilderness Coalition*, 870 F.Supp. at 985, 988-89 (seeping and leaching of pollutants from mine tailing ponds). Accordingly, some of the same occurrences that constitute a "release" under CERCLA are a "discharge" regulated under the CWA as long as the pollutants reach a navigable water by means of a point source.

The focus of the Clean Water Act is not on the activity which results in the point source discharge, but is rather on the point source discharge itself. The CWA was "designed to regulate to the fullest extent possible those sources emitting pollution into rivers, lakes and streams." *Earth Sciences, Inc.*, 599 F.2d at 373; 33 U.S.C. §1251(a). If Congress wanted to exempt point source discharges from

"passive" landowners from NPDES regulation, it would have used more restrictive language. Instead, Congress clearly manifested its intent to regulate "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §1362(12). El Paso does not point to any language in the CWA or the EPA's implementing regulations to support its position that the owner of a point source is not responsible for unpermitted discharges if the owner did not engage in any affirmative activity to facilitate the discharge.

Finally, I am not persuaded by defendant's concern that plaintiffs' construction of the CWA will create potential liability for the owners of thousands of inactive mining sites and will likely result in a flood of citizen suits because there are more than 23,000 abandoned mines in Colorado. (*See* Plaintiffs' Ex. 14, *Colorado Mining Water Quality Task Force Report and Recommendations Regarding Water Quality Impacts from Abandoned or Inactive Mined Lands*, p. 5) The possibility that the federal courts will be inundated with citizen suits is not a reason to adopt the defendant's construction of the Act.

I find and conclude as a matter of law that the CWA regulates point source discharges from inactive mines, even if the owner of the point source has never conducted mining activity on the mining property and did not construct the point source. Accordingly, El Paso must comply with NPDES permitting requirements if the polluted water brought into the Tunnel through the El Paso shaft is ultimately discharged into Cripple Creek.

4. Liability for the discharge of pollutants into Cripple Creek

Plaintiffs move the court for the entry of summary judgment in their favor on defendant's liability for discharging pollutants into Cripple Creek from the El Paso shaft and the Roosevelt Tunnel without an NPDES permit. I have concluded that the El Paso shaft, connected mine workings and the Roosevelt Tunnel are point sources and that Cripple Creek is a navigable water. The evidence is undisputed that water containing zinc and manganese is discharged from the El Paso shaft into the Tunnel and from the Tunnel into Cripple Creek. It is also undisputed that zinc and manganese are pollutants and that defendant does not have an NPDES permit. The question remaining is whether plaintiffs have established a hydrological connection between the pollutants conveyed to the Tunnel through the El Paso shaft and related mine workings and the pollutants discharged at the Tunnel portal into Cripple Creek.

Plaintiffs' expert geologist, Kenneth Klco, opines that at least some of the water discharged into the Roosevelt Tunnel from the El Paso shaft ultimately flows into Cripple Creek from the Tunnel portal. (*Expert Report of Kenneth Klco*, p. 2) Klco's conclusion is based on his August 2001 inspection of the interior of the Tunnel when he observed that water flowed continuously out of the El Paso shaft along the Tunnel floor to the Tunnel portal and that there was a constant discharge from the Tunnel portal into Cripple Creek. (*Id.*, pp. 3-4; *Deposition of Kenneth Klco*, Defendant's Ex. A-1, pp. 68, 73, 90-91, 137-38) Klco further observed that beyond the El Paso shaft, the Tunnel turned to the northwest and there was no longer a continuous flow of water. (Klco Deposition, p. 96) Instead, there were

only small pools of water on the Tunnel floor. (*Id.*, pp. 96-97) Klco noted water seeping into the ribs and ceiling of the Tunnel at various locations between the portal and the El Paso shaft. (*Id.*, pp. 83, 118, 133) Klco testified that precipitation flowing through fractures or faults in granite rock can pick up pollutants such as zinc and manganese from the rock and carry the metals away as it infiltrates downward. (*Id.*, pp. 143-51) Klco did not sample any of the inflows of water seeping into the Tunnel between the El Paso shaft and the Tunnel portal to determine if the inflows contained zinc or manganese. (*Id.*, pp. 154-55)

Klco estimated, based on his field observations, that thirty gallons per minute ("g.p.m.") of water were being released from the El Paso shaft into the Tunnel, an additional five to eight g.p.m. of cumulative inflows occurred in the two and a half miles between the El Paso shaft and the Tunnel portal, and fifteen g.p.m. were flowing out of the Tunnel portal. (Klco Deposition, pp. 91, 135-137, 241-42) Klco testified that not all of the water entering the Tunnel from the El Paso shaft is discharged at the Tunnel portal because some water exfiltrates through the Tunnel floor along its length. (*Id.*, pp. 135-137, 199-205) Klco opines, however, based on his field observations, that at least half the water flowing from the El Paso shaft is ultimately discharged from the Tunnel portal. (*Id.*, pp. 162-163, 179) Klco further opines that the discharge rate from the Roosevelt Tunnel is associated with changes in precipitation at the surface. (*Id.*, pp. 159-160)

Plaintiffs' expert environmental engineer, Robert Burm, and plaintiffs' expert geochemist, Ann Maest, opine that at least some of the water carried to the Tunnel from the El Paso shaft and related mine workings is ultimately discharged from the Tunnel portal into Cripple Creek.

Burm and Maest base their opinions on Klco's inspection of the Tunnel, inspection reports from a CWQCD inspector and from Cripple Creek & Victor Gold Mine Company employees, and their review of maps and diagrams of the Mining District. (Plaintiffs' Exs. 6, 59, *Expert Report of Robert J. Burm; Maest Report*) In May 1995, Tom Boyce, a CWQCD inspector reported observing continuous flow from the El Paso shaft to the Tunnel portal, but noted that the flows fluctuated between two g.p.m. and fifteen g.p.m. (Plaintiffs' Exs. 15, 58)[14] Boyce also observed dozens of seeps in the Tunnel walls between the portal and the El Paso shaft. (*Id.*) John Hardaway, Director of Environmental Projects for AngloGold, the manager of the Cripple Creek & Victor Gold Mining Company, accompanied Boyce on the inspection and reported observing water flowing out of the El Paso shaft into the Tunnel. (*Id.*, Affidavit of John Hardaway) Employees of the Cripple Creek & Victor Gold Mining Company who inspected the Tunnel in the 1990's observed a continuous flow of water from the El Paso shaft to the Tunnel portal, with some exceptions, and one employee noted numerous seeps in the Tunnel walls. (*Id.*, internal memoranda from Andy Bordiuk, David Vardiman,

[14] Defendant objects to the admissibility of the inspection reports as unauthenticated and as hearsay. The EPA Director of Technical Enforcement, Region VIII has provided a sworn certification that the inspection reports are authentic copies of documents in her legal custody. (Plaintiffs' Ex. 58) Plaintiffs represent that AngloGold was required by law to submit the Roosevelt Tunnel inspection reports to the EPA in response to a request for information. There is no indication that the documents are lacking in trustworthiness. The documents are thus admissible under the public records exception to the hearsay rule, Fed.R.Evid. 803(8). *See Freeport-McMoran Resource Partners Ltd. Partnership*, 56 F.Supp.2d 823, 845 (E.D.Mich.1999).

Doug White, Glenn Asch, Jeff Pontius, Tim Brown and Tim Harris)

Defendant's expert hydrologist and groundwater geologist, Robert Brogden, opines that the discharge from the Roosevelt Tunnel into Cripple Creek averages sixteen g.p.m. (*Brogden Report*, p. 10) According to Brogden, water discharged from the Roosevelt Tunnel portal originates from surface precipitation which infiltrates the ground and then moves downwards through fractures in the granite rock until it intersects the Tunnel. (*Id.*, pp. 11, 13, 15) Flows from the Roosevelt Tunnel portal are also derived "from inflow from connected mines and other tunnels." (*Id.*, p. 13) Brogden opines that water flowing through the Tunnel toward the portal can exfiltrate through the Tunnel floor before reaching the Roosevelt Tunnel portal, as evidenced by the 1994 and 2000 water samples of Roosevelt Tunnel portal flows which reflect that zinc levels at the portal are greatly reduced compared to the zinc levels in water flowing in the first 3000 feet from the El Paso shaft to the portal. (*Id.*, pp. 11, 15; *Rebuttal Report of Robert E. Brogden*, pp. 2-3)

Brogden opines that "some of the water" entering the Tunnel from the El Paso shaft exfiltrates before it reaches the portal, and "not all of the water entering the tunnel from the El Paso shaft flows from the portal." (*Brogden Report*, p. 15) Brogden agrees with the plaintiffs' expert, Kenneth Klco, that some of the water flowing into the Tunnel from the El Paso shaft reaches the Tunnel portal intermittently and flows into Cripple Creek. (*Rebuttal Report of Robert E. Brogden*, pp. 1-2) Brogden states that more data is required to determine the exact contribution of overlying property owners to the flows from the Roosevelt Tunnel portal. (*Id.*, p. 3) Brogden concludes that

"pinpointing an ex[illegible] source or sources of water that flows from the portal is difficult because of the lack of data that adequately describe the geology and hydrology of the area and the actual movement of ground water in the country rock." (*Id.*) Brogden suggests that field measurements of flow in the Tunnel at different locations could help identify the responsible parties. (*Id.*)

El Paso contends that plaintiffs' expert reports do not cite any specific facts, data, or measurements to support a hydrologic connection and do not quantify any specific relationship between defendant's property and the flows discharged from the Tunnel portal. El Paso argues that genuine issues of material fact remain about the origins of the water that is discharged from the Roosevelt Tunnel portal into Cripple Creek. Defendant emphasizes that EPA and CWQCD technical staff concluded in July 2001 that "the full extent of the underground mine workings probably has not been mapped, . . . the effects of the workings on the hydrology is uncertain because of the limited information," and "more work needs to be done before the responsible parties can be identified." (Defendant's Ex. A-6, *July 19, 2001 Memorandum to David Akers, Water Quality Assessment Unit, from George F. Moravec Re: Meeting with EPA to Discuss Roosevelt Tunnel Hydrology*)[15] Defendant maintains that despite the conclusions of the agency experts in July 2001 that more studies were necessary to

[15] The Memorandum suggests the installation of a recording weir or flow device in the Tunnel beyond the El Paso shaft to assist the agencies' determination of whether any flows originate at that point, and further states that a "detailed mapping of the water producing fractures would help determine the location and area of surface watershed contributing to infiltration of ground water into the Tunnel." (Defendant's Ex. A-6)

understand the hydrology of the Tunnel, no further action has been taken.

I recognize that the sources of discharge from the Roosevelt Tunnel portal have not been fully identified at this time; however, a lack of complete knowledge of all sources of the discharge and of all responsible parties does not preclude El Paso's liability for discharging pollutants into Cripple Creek without an NPDES permit. Further, plaintiffs do not have to quantify the amount of pollutants being discharged by El Paso to prove that defendant is in violation of the CWA. The requirement that a person discharging pollutants from a point source obtain an NPDES permit "is unconditional and absolute." *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1374 (D.C.Cir. 1977) (internal quotation omitted). The Act prohibits "any addition of any pollutant." 33 U.S.C. §1311(a), §1362(12). Thus, the unpermitted discharge of *any amount* of pollutant into navigable waters from a point source violates the CWA. The fact that some of the pollutants discharged from the Roosevelt Tunnel into Cripple Creek may have entered the Tunnel through seeps in the Tunnel walls and ceiling, or from other unidentified sources, does not relieve El Paso from its statutory obligation to obtain a permit for its own illegal discharges. The experts agree that some of the polluted water conveyed to the Tunnel by means of the El Paso shaft is discharged at the Tunnel portal on an intermittent basis.

Moreover, the Memorandum upon which El Paso so heavily relies states that the "primary source contributing base flow to the tunnel's discharge comes from the El Paso shaft which drains the underground mine workings of the El Paso and connecting mines, and the water produced from fractures in the tunnel." (Defendant's Ex. A-6) This

conclusion is in accord with the opinions of plaintiffs' and defendant's experts that at least some of the polluted water flowing into the Tunnel from the El Paso shaft is discharged from the Roosevelt Tunnel portal.

Finally, defendant argues that summary judgment cannot enter in favor of the plaintiffs because the origins of the pollutants discharged from the El Paso shaft are unknown. I disagree. The origin of the pollutants is irrelevant. What matters is that the point source conveys the pollutants to navigable waters. *See Catskill Mountains Chapter of Trout Unlimited, Inc.*, 273 F.3d at 493.[16]

Because the evidence demonstrates that defendant is discharging pollutants into a navigable water from a point source without an NPDES permit, I grant plaintiffs' motion for summary judgment.[17] The appropriate relief will be determined at trial.

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[16] I also reject El Paso's contention that its discharges of pollutants into Cripple Creek do not violate the CWA because Cripple Creek is not listed in Colorado's 2002 List of Impaired Waterbodies. *See* El Paso Gold Mines, Inc.'s Notice of Supplemental Evidence . . . [filed November 8, 2002]. Neither the Act, the EPA's implementing regulations, nor interpretive case law provide that an unpermitted charge of pollutants is legal if the receiving water is not impaired. I note, however, that the scope of any actual threat to the environment may be considered in determining an appropriate civil penalty. *See Hudson River Fisherman's Ass'n v. Arcuri*, 862 F.Supp. 73, 76 (S.D.N.Y. 1994).

[17] I do not reach plaintiffs' argument that defendant is judicially estopped from contesting its liability for discharging pollutants without a permit in violation of Sections 301 and 402 of the CWA.

IV.

It is HEREBY **ORDERED** that:

(1) Plaintiffs' Motion for Summary Judgment on the Issues of Standing and Liability [filed September 20, 2002] is **GRANTED**.

(2) El Paso Gold Mines, Inc.'s Motion for Summary Judgment [filed September 20, 2002] is **DENIED**.

(3) A final trial preparation conference will be held on **November 25, 2002 at 8:30 a.m.** in Courtroom 4, 901 19th Street, Denver, Colorado 80294.

(4) A remedies trial will be held **December 9-17, 2002** in Courtroom 4, 901 19th Street, Denver, Colorado 80294.

Dated this 15th day of November, 2002.

BY THE COURT:

/s/ Patricia A. Coan
PATRICIA A. COAN

United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
MAGISTRATE JUDGE PATRICIA A. COAN

Civil Action No. 01-PC-2163 (OES)

SIERRA CLUB AND MINERAL POLICY CENTER,

Plaintiff,

v.

EL PASO GOLD MINES, INC.,

Defendant.

JUDGMENT

(Filed Feb. 11, 2003)

Pursuant to and in accordance with the Memorandum Opinion and Order signed by Magistrate Judge Patr[illegible]a A. Coan on February 10, 2003, incorporated herein by reference, it is

HEREBY ORDERED that judgment is entered in favor of plaintiffs Sierra Club and Mineral Policy Center, and against El Paso Gold Mines, Inc. It is

FURTHER ORDERED that El Paso Gold Mines, Inc. shall pay to the United States Treasury a civil penalty in the amount of $94,900 within thirty (30) days of the entry of final judgment in this action. It is

FURTHER ORDERED that El Paso Gold Mines, Inc. shall apply for an NPDES permit with the Colorado Water Quality Control Division within fifteen (15) days of the entry of final judgment in this action. It is

FURTHER ORDERED that plaintiffs are entitled to an award of their attorney's fees and costs incurred in this litigation. Plaintiffs shall submit their affidavit and application for attorney's fees and costs within fifteen (15) days of this Order. Defendant's objections to the reasonableness of plaintiffs' request shall be filed within fifteen (15) days thereafter. A hearing on the reasonableness of attorney fees and costs requested will be set at a later date. It is

FURTHER ORDERED that the Complaint and this civil action are dismissed with prejudice.

DATED at Denver, Colorado, this 10th day of February, 2003.

FOR THE COURT
/s/ James R. Manspeaker
James R. Manspeaker, Clerk

APPROVED:

/s/ Patricia A. Coan
PATRICIA A. COAN,
Magistrate Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
MAGISTRATE JUDGE PATRICIA A. COAN

Civil Action No. 01-PC-2163 (OES)

SIERRA CLUB and MINERAL POLICY CENTER,

Plaintiff,

v.

EL PASO GOLD MINES, INC.,

Defendant.

JUDGMENT ON ATTORNEY FEES
AND LITIGATION COSTS

(Filed May 2, 2003)

Pursuant to and in accordance with the Order on Attorney Fees and Litigation Costs, entered on May 2, 2003 by Magistrate Judge Patricia A. Coan, which is incorporated herein by reference as if fully set forth it is

ORDERED that Plaintiff's Motion for Award of Attorney's Fees, Expert Witness Fees and Litigation Expenses, filed February 23, 2003 is granted in part and denied in part. It is therefore

ORDERED that defendant El Paso Gold Mines, Inc. shall pay $212,948.75 in attorney fees to Mr. Barth; $9,262.50 to Mr. Flynn; $6,778.75 to Mr. Parsons; $6,300.00 to Mr. Barth for University of Colorado student law clerks; $689.19 in out of pocket litigation expenses to Mr. Barth; and $11,267.00 to Mr. Barth for experts' fees. It is

FURTHER ORDERED that judgment [] entered in favor of plaintiff Sierra Club and Mineral Policy Center and against defendant El Paso Gold Mines, Inc. for a total award of $247,246.19, which El Paso Gold Mines, Inc. is to pay within twenty (20) days of the entry of judgment on order entered May 2, 2003, with post judgment interest to accrue at the federal rate beginning on the 21st day after judgment is entered.

DATED at Denver, Colorado, this 2nd day of May, 2003

FOR THE COURT:

JAMES R. MANSPEAKER,
CLERK

By: /s/ Stephen P. Ehrlich
Stephen P. Ehrlich
Chief Deputy Clerk

BEFORE THE WATER QUALITY CONTROL DIVISION

STATE OF COLORADO

CASE NO. WQ 2002001

INITIAL DECISION

IN THE MATTER OF EL PASO GOLD MINES, INC.,

A hearing in this matter was held before Administrative Law Judge ("ALJ") Matthew E. Norwood on January 22-24 and 27, 2003. Senior Assistant Attorney General Jerry Goad appeared on behalf of the Water Quality Control Division ("Division") of the State Department of Public Health and Environment ("State Department"). James Merrill and Stephen Harris appeared on behalf of the Respondent, El Paso Gold Mines, Inc. ("EPGM").

ISSUES PRESENTED AND PROCEDURAL HISTORY

The Notice of Violation and the Answer

On July 25, 2002, J. David Holm, the Director of the Division, issued a Notice of Violation/Cease and Desist Order to EPGM. The Notice contained findings of fact, a notice of violation and a cease and desist order along with other provisions.

The Notice alleged that:

a. EPGM owns the El Paso Mine west of Colorado Springs, between the towns of Cripple Creek and Victor, in Teller County, Colorado.

b. The El Paso Mine's El Paso Shaft connects to the Roosevelt Tunnel; a man-made tunnel built around 1910 to drain subsurface water from the Cripple Creek Mining District.

c. Water flows out of the Roosevelt Tunnel into Cripple Creek.

d. Water flowing into the Roosevelt Tunnel is derived predominantly from the El Paso Shaft.

e. The pollutants, zinc and manganese, flow down the El Paso Shaft, and out the Roosevelt Tunnel.

f. The El Paso Shaft, as well as the portal of the Roosevelt Tunnel, is each a "point source" as defined by Section 25-8-103(4), C.R.S.

g. EPGM is discharging pollutants as defined by Section 25-8-103(3), C.R.S. without a permit. That subsection defines "discharge of pollutants" as the "introduction or addition of a pollutant into state waters."

h. This activity contravenes Section 25-8-501(1), C.R.S., which prohibits the discharge of pollutants by a person from a point source without a permit.

i. EPGM has no such permit.

On August 23, 2002, EPGM sent an Answer to the Division. The Answer requested a hearing per Section 25-8-603, C.R.S. Such hearings are to be held before an Administrative Law Judge ("ALJ") in accordance with Section 24-4-105, C.R.S. Section 25-8-603(4). On September 17, 2002, Goad filed El Paso's Answer to the Notice with the Division of Administrative Hearings.

In its Answer, EPGM admitted it was a "person" and that it had no permit. It admitted that, intermittently, water flows from the Roosevelt Tunnel portal into Cripple Creek. El Paso admitted that on November 16, 2000, the water from the El Paso Shaft into the Roosevelt Tunnel had zinc and manganese, which it agreed were pollutants. EPGM also acknowledged that water in the Roosevelt Tunnel on that date contained zinc and manganese. However, EPGM denied that it was responsible for the pollutants in the water at either point source as identified by the Division. It stated that the water flowing into the Roosevelt Tunnel from the El Paso Shaft does not have its origins on property owned by EPGM. EPGM denied that it was responsible for the pollutants in the water at the Roosevelt Tunnel portal because, according to it, water can seep into and out of the tunnel along its length. For these reasons, EPGM denied that either location was a "point source."

EPGM's Motion for Summary Judgment

On October 15, 2002, EPGM filed a Motion for Summary Judgment. In the motion, EPGM stated that it is not mining on its property. According to it, any mining operations that might have caused a discharge of pollutants ceased decades ago. It argued that the Colorado Water Quality Control Act was not intended to impose liability on purely passive landowners, and that affirmative conduct is required to show the "discharge of a pollutant" as proscribed by Section 25-8-501(1), C.R.S. "Discharge of pollutants" is defined as the "introduction or addition" of a pollutant into state waters. Section 25-8-103(3), C.R.S.

EPGM relied chiefly upon *Froebel v. Meyer,* 217 F.3d 928 (7th Cir. 2000). That case concerned the federal Clean Water Act, 33 U.S.C. Section 1365. In *Froebel,* the defendant Waukesha County in Wisconsin was not liable under the Clean Water Act for the discharge of silt after the removal of a dam. The County was not involved in the removal of the dam, but it owned the property on which the dam originally stood. The key issue for the present case was whether the County was required to have a permit under Section 404 of the Clean Water Act, 33 U.S.C. Section 1344, for the "discharge of dredged material." This is defined as "any addition of dredged material" at 33 C.F.R. Section 323.2(d)(1) and the "discharge of fill material" or the "addition of fill material into waters of the United States" at 33 C.F.R. Section 323.2(f). *Froebel* at 938. The Court found that Section 404 required active conduct on the part of the County that resulted in the discharge of dredged or fill material. As the County merely owned the land, the Court found that it was not required to obtain a permit.

The ALJ denied EPGM's Motion for Summary Judgment in an order dated December 30, 2002. The ALJ determined that the proper interpretation of *Froebel* was not dispositive. *Froebel* and all the other federal authority cited construing the federal Clean Water Act is merely advisory. The ALJ is not bound to follow federal law in construing a state statutory scheme where, as is the case here, there is no authority that the federal law prevails. *Northern Colorado Medical Center Inc. v. Committee on Anticompetitive Conduct,* 914 P.2d 902, 906 (Colo. 1996).

Ironically, the Division argued that federal law *did* prevail. It relied on Section 25-8-202(6), C.R.S. However, that subsection merely requires the Water Quality Control

Commission to maintain a program that "does not conflict with the provisions of the federal act." It is the Division that administers and enforces the Commission's programs. Section 25-8-301(2), C.R.S. Even if the Clean Water Act did not apply to passive activities such as El Paso's, the Division could still more aggressively enforce its own regulations to apply to situations the federal law does not. *Keith v. Rizutto*, 212 F.3d 1190, 1193 (10th Cir. 2000).

The ALJ also rejected EPGM's argument that the "introduction or addition of a pollutant" language in Section 25-8-103(3) is, on its face, inapplicable to passive landowners. The language is simply ambiguous. As such, the Division's interpretation of this language, at least historically, was factually significant. As this genuine issue of material fact was disputed, the ALJ denied EPGM's motion for summary judgment. C.R.C.P. 56(c).

The Division's Motion for Summary Judgment

The Division filed its own Motion for Summary Judgment on November 8, 2002. In its Reply to EPGM's Response to its Motion, it attached a Memorandum Opinion and Order dated November 15, 2002 by United States Magistrate Judge Patricia A. Coan. The order was in case no. 01-PC-2163 (OES) brought by the Sierra Club and the Mineral Policy Center against EPGM. In that order, the Court granted summary judgment for the plaintiffs and rejected summary judgment for EPGM on very similar issues to this case.

In that case, as here, it was undisputed that EPGM had never engaged in active mining operations. Magistrate Judge Coan rejected EPGM's reliance on *Froebel v. Meyer*. She held that *Froebel's* requirement of more than mere

passive ownership-under the dredge and fill regulations of Section 404 did not apply to section 402. The Court relied on what it described as *dicta* in *Sierra Club v. Abston Const. Co., Inc.*, 620 F.2d 41 (5th Cir. 1980), that ownership of a point source of pollution, without more, is enough to trigger liability under the Clean Water Act. The Court determined that if Congress wanted to exempt passive landowners from the reach of the Clean Water Act, it would have used more restrictive language. By this, she rejected EPGM's contrasting of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") regulations that more explicitly impose liability on landowners for the passive "leaking," "escaping," or "leaching" of a hazardous substance. 42 U.S.C. Section 9601(22).

Turning to the issue of whether a genuine issue of material fact existed in her case, Magistrate Judge Coan determined: "the experts [for plaintiff and defendant] agree that some of the polluted water conveyed to the [Roosevelt Tunnel] by means of the El Paso shaft is discharged at the [Roosevelt Tunnel] portal on an intermittent basis." Slip op. at 31. Based on this, and on the Court's determination that El Paso was the owner of a "point source" of zinc and manganese pollution, Magistrate Judge Coan granted summary judgment in favor of the Sierra Club and the Mineral Policy Center.

Despite the finding of Magistrate Judge Coan, though, the ALJ could not discern an agreement among the experts in this case that there was a continuous flow of water containing zinc and manganese from the property of EPGM, down the El Paso Shaft and out the Roosevelt Tunnel portal. As there was still a genuine issue of material fact as to these issues, the ALJ denied the Division's

Motion for Summary Judgment in the same December 30, 2002 Order.

FINDINGS OF FACT

Based upon the evidence presented at the hearing, the ALJ finds as fact:

1. EPGM, a corporation, owns the El Paso Mine west of Colorado Springs, between the towns of Cripple Creek and Victor, in Teller County, Colorado. The property is an oval shape running southeast to northwest. As reflected in exhibit 7 admitted at hearing, the area of the Mine on the surface is approximately 4,000 feet long and 1,500 feet wide. The property owned by EPGM extends below the surface for eight levels of mine workings. More precisely, the El Paso Mine consists of 60 to 80 separate "assessors:" slivers of property ranging from .03 acres up to 13 acres. These slivers include the land underground.

2. Exhibit PP admitted in evidence is a map of the United States Geological Survey ("U.S.G.S."). A U.S.G.S. notation on the map provides: "this map is preliminary and has not been edited or reviewed for conformity with U.S. Geological Survey standards and nomenclature." Despite this proviso, exhibit PP is the best and only real measure in this case of the underground dimensions of the El Paso Mine. The map shows all eight levels of mine workings superimposed on one another. All levels of mine workings on exhibit PP with the words "El Paso" are part of the mine. These mine workings are found on the left 40% of exhibit PP. The property on PP labeled "CK & N" is also part of the El Paso Mine.

3. Since EPGM's formation in 1968, it has never conducted any mining operations on its property. EPGM has never conducted any activity that causes pollution to run off its property; it is a wholly passive landowner.

4. EPGM's property surrounds the El Paso Shaft, a vertical shaft that descends and connects by a short "drift" to the Roosevelt Tunnel. It was formerly an elevator shaft used by miners to access the various levels of the Mine. The El Paso Mine includes the El Paso Shaft. The "head frame" of the El Paso Shaft, the point where the shaft reaches the surface, is no longer open to the air due to the collapse of mine workings.

5. The Roosevelt Tunnel is a man-made tunnel built around 1910 to drain subsurface water from the Cripple Creek Mining District. The Roosevelt Tunnel is a ninth level below the eight other levels of the El Paso Mine. The point where the Roosevelt Tunnel comes out of the ground is referred to as the Roosevelt Tunnel portal. EPGM has no ownership in the portal.

6. The Carlton Tunnel was completed in the 1940's. This tunnel is lower in elevation than the Roosevelt Tunnel and it drained the subsurface water to a level below the level of the Roosevelt Tunnel.

7. CC & V's property is above the Roosevelt Tunnel, up-gradient from the Tunnel's junction with the El Paso Shaft. Generally speaking, CC & V's property is on and in the main diatreme that provides most of the ore producing rock in the area. A diatreme, or caldera, is a volcanic intrusion into the surrounding rock: in this case, an ancient volcano. The diatreme begins at a point about 2,000 to 3,000 feet further up the Tunnel from the El Paso Shaft. EPGM's property is outside of the diatreme.

8. The rock through which the Roosevelt Tunnel passes prior to reaching the diatreme is granite "country rock." Except for areas close to the surface, this granite is non-weathered and so is very solid and impermeable. EPGM's mine workings and the El Paso shaft are in this rock. Water travels through this rock only on preferential flow paths: fractures and faults and places where the rock has been broken.

9. The rock in the diatreme, volcanic breccia, is relatively permeable, however. The water in the diatreme has been drained first by the Roosevelt Tunnel and then later by the Carlton Tunnel. Any water now passing through the diatreme, whether from precipitation or underground sources, does not follow preferential flow paths only. Rather, it flows all through the rock.

10. The rock in and outside of the diatreme contains zones of mineralization. Associated with these zones of mineralization are veins of ore and heavy metals like zinc and manganese. These heavy metals also contain sulfide minerals. When exposed to air, these sulfide minerals oxidize and produce acid, which, by lowering the pH of the water, causes the dissolution of the heavy metals into solution in the water.

11. From. January 1996 to December of 2000, water flowed out of the Roosevelt Tunnel from as little as 0 to as high as 90 gpm for an average of 19.2 gpm. (Exhibit KK, Attachment B, Bate stamp page 1279.)

12. On October 14, 1994, there were 51 mg. of manganese per liter of water in the water at the bottom of the El Paso Shaft. This dropped to .66 mg. at 2000 feet downstream from the Shaft. There were 4.3 mg. of dissolved zinc per liter of water on that date at the Shaft. The

amount of zinc dropped to .009 mg. of dissolved zinc 2000 feet downstream from the Shaft. (Exhibit HH1.)

13. Exhibit HH3 contains two sets of water quality sample data for August 7, 2001. The first set is taken at the base of the Shaft. The location of the second set is unclear; it is only marked with the initials "RT," presumably standing for some place on the Roosevelt Tunnel. The manganese at the bottom of the Shaft is 23 parts per million ("ppm") and the zinc is 2.63 ppm. For "RT," the manganese reading is less than .05 ppm and the zinc is .056 ppm.

14. In May of 1995, Tom Boyce of the Division conducted an inspection and discovered the discharge of pollutants from the Roosevelt Tunnel. He noted that the flow along the bottom of the Roosevelt Tunnel varied from two gallons per minute ("gpm") to 15 gpm. The evidence is not clear at how he arrived at this measurement; it may have been a visual estimate. Boyce noted dozens of seepages from the walls and ceiling of the Roosevelt Tunnel from the portal to the El Paso Shaft. Boyce also observed this same variable flow (from two gpm to 15 gpm) past the El Paso Shaft up gradient for three quarters to one mile. Boyce went into the Tunnel and noticed that the number of seepages appeared to diminish along this portion. Boyce concluded: "since the flow fluctuates numerous times between the source and the portal, measurement at the portal is not necessarily indicative of the flow at any point along the tunnel." (Exhibit 8.) Based on Boyce's inspection, the Division determined that the discharge was the responsibility of the Cripple Creek and Victor Mining Company ("CC & V"), also known as Anglogold.

15. On November 16, 2000, CC & V conducted an inspection of the Roosevelt Tunnel and took water quality measurements at different points along the tunnel. The leader of the inspection was David Vardiman. CC & V made a videotape of that Inspection. (Exhibit 12.) The videotape has been converted to DVD. (Exhibit 12B.)

16. The Vardiman inspection calculated the flow of the water as approximately 50 gpm at 200 feet in from the portal; 8.3 gpm at somewhere between 200 and 6,800 feet in; 5.5 gpm at 6,800 feet in; and 5.5 gpm at the El Paso Shaft, 15,000 feet in. (Exhibit 39.)

17. The Vardiman inspection detected 26 mg. of manganese per liter of water in the water at the base of the El Paso Shaft. Zinc was detected in the amount of 2.3 mg. per liter at that location. At a point 700 feet in from the portal the manganese had dropped to .548 and the zinc to.17 mg. per liter. (Exhibit HH2.)

The Videotape

18. The videotape of the Vardiman inspection of November 16, 2000 shows the following:

a. First, the videotape shows the Roosevelt Tunnel portal. The water at the portal is ponded and frozen. It is impossible to say if there is water flowing under the ice. Once the CC & V employees enter the Tunnel, the only illumination is headlamps and flashlights.

b. The videotape, taken in November, reveals less water flow than that observed by Boyce in May of the year. It shows a constant flow of water from the El Paso Shaft to the frozen ponded section before the portal. Two

main inflows into the Tunnel between the portal and the El Paso Shaft also supply water. The first is frozen and appears in the form of large icicles. The second, further in, is unfrozen water spurting out of the side of the Tunnel. The flow of water up-gradient from this second point is noticeably less.

c. At the El Paso Shaft a great deal of water is pouring down.

d. The videotape shows that up-gradient past the El Paso Shaft, the tunnel is dry well before it enters the main diatreme. Cracked and dried mud provides evidence that water has backed up to the point near the border of the diatreme and the surrounding granite.

e. At various portions along the water flow in the Roosevelt Tunnel, the CC & V employees measured the depth and width of the stream. At one point they came upon a small drop of water that they termed "a natural weir."

19. After reviewing the videotape, and, in particular, the fact that the tunnel was dry prior to reaching CC & V's property, the Division concluded that it could not be shown that CC & V was responsible for the polluted water coming out of the Roosevelt Tunnel portal.

20. A Division memorandum concerning a July 19, 2001 meeting about the Roosevelt Tunnel with representatives from the United States Environmental Protection Agency ("EPA") (exhibit 15), states in part:

> We also agreed that more work needs to be done before the responsible parties can be identified. The primary source contributing base flow to the tunnel's discharge comes from the El Paso shaft

which drains the underground mine workings of the El Paso and connecting mines, and the water produced from fractures in the tunnel. The full extent of the underground mine workings probably has not been mapped, and the effects of the workings on the hydrology is uncertain because of the limited information. More information is needed about the underground working of the El Paso Mine and any other mines connected to the El Paso along with ownership.

21. At the July 19, 2001 meeting, Division employees discussed placing recording weirs in the Roosevelt Tunnel to determine how much of the water in the Roosevelt Tunnel was coming down the El Paso Shaft and how much was coming from other sources. A weir is a measuring device that measures the flow of water past a point. It backs the water up and then allows the water to flow through an opening in a free fall. However, no such measuring devices were installed in the Tunnel.

22. The EPA required CC & V to keep water quality data for the Roosevelt Tunnel up until May of 2002. At times, CC & V did not take measurements because the water was frozen at the portal.

The Expert Testimony

Testimony of Michael Wireman

23. The fact finding in this case requires the evaluation of the testimony of various expert witnesses. Consequently, the ALJ will discuss the testimony of these witnesses to explain how the findings of fact were arrived at. Michael Wireman is a hydrologist with the EPA. He attended the July 19, 2001 meeting. He testified for the Division as follows:

a. The methods used by the CC & V employees to measure water flow in the Roosevelt Tunnel were not accurate. Visual estimates are also not very accurate.

b. A flume is a device that can be set up at a particular point in a stream to measure the flow of water. Wireman believes a flume is an accurate method of measurement of the amount of water flowing in a stream. A flume has not been used to measure water flow within the Roosevelt Tunnel.

c. Dye tracing is a method that can be used to discover the path and speed of water flow. Dye tracing has not been used to discover the source of the water flowing down the El Paso Shaft into the Roosevelt Tunnel.

d. The water observed on the videotape coming down the El Paso Shaft has two potential sources. First, some of the water may be draining directly from the surface down the Shaft. Second, water may be draining from the surface into one of the eight levels of workings that make up the El Paso Mine and then into the Shaft. Wireman could not say for certain, which of these two ways or which combination of the two ways accounted for the water coming down the Shaft.

e. As the Roosevelt Tunnel was through granite, Wireman did not expect water to flow out the floor of the Tunnel. He believes that sedimentation and precipitation of minerals out of the water would form a seal on the floor of the Tunnel at any point where the tunnel intersects a fissure. He believes there is also not enough water pressure or "hydraulic head" to cause the water to go down through the floor. Finally, Wireman relies on the fact that the videotape shows continuous flow from the El Paso Shaft to the frozen area just at the Roosevelt Tunnel portal

to conclude that water is not flowing through the floor of the Tunnel. Wireman believes the water is flowing under the ice at the portal.

f. The 2.3 mg. per liter to .17 mg. per liter reduction in the amount of zinc in the water between the Shaft and the portal recorded by the Vardiman inspection occurs because of the dilution of the water by the addition of more water, chiefly the second, unfrozen spurting inflow seen on the videotape. However, on cross-examination, Wireman agreed that for the zinc numbers to dilute this much would require a ten times increase in the amount of water in the Tunnel, which Wireman acknowledged could not be the case. In response to this cross-examination, Wireman testified that the zinc could be precipitating out of the water due to changes in pH or changes in the amount of dissolved oxygen or due to other factors.

Testimony of Robert Brogden

24. Robert Brogden testified for EPGM. He has expertise in the areas of geology and groundwater. He is a partner in the water-consulting firm of Bishop-Brogden Associates. Brogden testified in pertinent part as follows:

a. He prefers accurate stream gauging measurements instead of the "reconnaissance" type of measurements taken by the CC & V employees.

b. Using the widths and depths measurements taken by the CC & V employees, Brogden created a graph admitted as exhibit UU. The points along the graph were calculated using, with one exception, the "weir equation." The weir equation is to be used where there is a constriction and a drop in the water. The weir equation assumes

that the water has stopped and has been backed up before it drops, thereby eliminating the need to account for water velocity and resistance of the stream bed.

c. In the case where the water is free flowing, the "Manning equation" should be used. The Manning equation does require a determination of the velocity of the water and resistance.

d. Using the depths and widths called out on the videotape by the Vardiman inspection, Brogden calculated that the water in the Roosevelt Tunnel between the El Paso Shaft and the Roosevelt Tunnel portal varied from zero at the frozen portal to as much as 50 gpm at approximately 1,750 feet in. This amount, according to Brogden drops down to 19 gpm at 2,750 feet in, and then back up to 65 gpm at 8,000 feet in, and then back down to 19 gpm at the El Paso Shaft, 14,000 feet in.

e. Brogden was careful to qualify his opinion as to the accuracy of his estimates of water flow through the Tunnel. He testified that for the point RT1 +, at 1,750 feet in to the Tunnel, he chose not to use the weir equation as he had done for all other points. He did so because the weir equation produced the number of 150 gpm, which he rejected as simply too high. He instead used the Manning equation at that location, which produced a figure of 50 gpm.

f. Brogden felt that CC & V's calculations of water flow improperly used the Manning's equation in places where the weir equation should have been used.

g. Although Brogden acknowledged the likelihood of sediment and precipitate lying at the bottom of the channel, he was still of the opinion that "potentially" 80 to

120 gallons per minute can leave the Roosevelt Tunnel through its floor for the total distance from the El Paso Shaft and the portal.

Testimony of Arthur P. O'Hayre

25. Arthur P. O'Hayre testified for EPGM. He is a Vice President at the consulting firm Applied Hydrology Associates. He has expertise in the area of geochemistry. He testified in pertinent part as follows:

a. The source of the water coming down the El Paso Shaft cannot be determined with scientific certainty.

b. As Cripple Creek is approximately one hundred feet above the bottom of the El Paso Shaft and approximately 2,000 to 2,500 feet away, water could be flowing out the bottom of Cripple Creek and down the Shaft. Water in Cripple Creek has tested positive for zinc and manganese.

c. It is also possible that zinc and manganese could be picked up from underground mine workings. However, the sulfate levels in the water tested at the bottom of the El Paso Shaft do not show a high level of acid mine drainage suggestive of mine workings as a predominant source of the zinc and manganese.

d. O'Hayre would have preferred to see more exact flow data for the Roosevelt Tunnel such as dye dilution or chemical dilution studies.

e. O'Hayre relied on exhibit UU to make calculations as to whether the zinc and manganese in the water at the Shaft was making it all the way to the portal. His testimony was that you cannot be sure.

Consideration of the Expert Testimony

26. The ALJ finds that Wireman is correct when he testified that visual estimates of water flow are likely to be inaccurate even by experienced professionals. It is common sense that visual estimates would be inaccurate, even in broad daylight. Such estimates would certainly be more difficult in a dark mine tunnel illuminated only by headlamps and flashlights: the case in the videotape.

27. Wireman testified that a flume is the proper method to measure water flow, and a flume was not used. This testimony of Wireman is supported by Brogden's clear preference for accurate stream flow measuring devices: devices not used on the videotape. O'Hayre also testified that more accurate measurements of stream flow would have been helpful; he would have liked to see dye or chemical dilution studies. Finally, a preference for accurate stream flow measuring devices is expressed in the memorandum memorializing the July 19, 2001 meeting between the EPA and the Division.

28. In addition to his preference for accurate stream flow measuring devices, Brogden was careful to qualify his opinion as to the accuracy of his water flow measurements. Also, his decision to reject the weir equation at RT1 +, because it produced a number that was too high, casts doubt on all the other instances where he used that equation. The Vardiman inspection water flow measurements are inconsistent with those of Brogden and Brogden quarrels with CC & V's calculations. Wireman testified that visual estimates are inaccurate but relies on the fact that there is continuous flow to say that El Paso Shaft pollutants are making it all the way to the portal. Wireman does not have objective scientific data to explain why

the zinc levels drop so dramatically from the Shaft to the portal.

29. The ALJ finds as fact that the water flow measurements, such as exhibit UU, produced from the data gathered on Vardiman's CC & V inspection carry little weight. For this reason, O'Hayre's calculations based on UU also carry little weight. The experts were unanimous as to the need for accurate, scientific and generally accepted water flow measuring devices for the flow of water in the Roosevelt Tunnel. Yet neither Vardiman, nor anyone else has ever measured the flow of water in the Tunnel using such devices.

30. In addition to the lack of reliable flow measuring devices, the dramatic drop offs of zinc and manganese levels between the Shaft and the portal are not explained by objective scientific data. These drop offs have been detected on numerous occasions.

31. Because of the lack of scientific flow measuring devices and because of the unexplained drop offs in the levels of zinc and manganese from the Shaft to the portal, the ALJ finds as fact that there is insufficient evidence to find that EPGM is responsible for the zinc and manganese in the water at the portal.

32. On the other hand, it is more likely than not that some of the zinc and manganese in the water coming out of the bottom of the El Paso Shaft picked up those pollutants from the mine workings that are part of the "El Paso Mine" owned by EPGM. The El Paso Mine was made to mine ore. The mining of ore exposes zones of mineralization to the air. This causes the oxidation of sulfide minerals, which produces acid. The acid, by lowering the pH of

the water, causes the dissolution of the heavy metals, such as zinc and manganese, into solution in water.

33. Considering the area of the mine on the surface and the eight levels of mine workings making up the El Paso Mine as depicted on exhibit PP, all of which surround the Shaft, *some* amount of the zinc and manganese in the water at the bottom of the El Paro Shaft must have as its source the zones of mineralization exposed by the workings of the El Paso Mine. The ALJ acknowledges O'Hayre's testimony that the sulfate levels measured at the bottom of the Shaft do not show a high level of acid mine drainage suggestive of mine workings as a predominant source of the zinc and manganese. However, this is not the same thing as saying the Mine is not the source of *any* of these pollutants.

The Division's Permitting Policy and Practice

34. On June 24, 1987, the Division made effective a Permit Policy of Mining Activities (exhibit 38). The purpose of the policy was to provide clarification and consistency in the permitting of active, inactive and exploratory mining activities. In pertinent part the policy provided:

> A. *Active Mines*
>
> All active mines that have a point source discharge are required to have a permit. The intent is to also apply the permit inactivation portion of this policy to facilities that have had mining activities in recent years, even though they may be currently inactive.

B. *Inactive/Abandoned Mines*

> In general, the division will not actively pursue permitting of currently unpermitted inactive/abandoned mines. On a case-by-case basis however, the division may pursue remediation of significant water pollution problems from inactive/abandoned mines through either point or non-point source authority.

35. Based on paragraph B of the policy, the ALJ finds that, as of June 24, 1987, the Division interpreted its authority to apply to inactive mines. At inactive mines, the owner is doing nothing affirmative to cause the discharge of pollutants.

36. The Division has issued a permit to Battle Mountain Gold Company in Costilla County for the discharge of pollutants from an inactive mine. The Division has also issued a permit to New Cardinal, LLC, a landowner that owns property upon which the portal from an inactive mine discharges. Finally, the Division has issued several permits in the southwestern portion of Colorado, mainly to the Sunnyside Gold Corporation, for inactive mines or mine-related activities. Of these three cases, New Cardinal, LLC is the only case where the landowner did not, at one time, actively mine the property. The permit for New Cardinal, LLC was issued in December of 2002. In the case of New Cardinal, it was New Cardinal itself that approached the Division about obtaining a permit.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ enters the following Conclusions of Law:

1. Hearings regarding violations of the Colorado Water Quality Control Act are to be held in accordance with Section 25-8-603(4), C.R.S. This initial decision is issued as described in Section 24-4-105(14), C.R.S.

2. The Division has the burden of proof in this matter to prove the allegations of the Notice of Violation/ Cease and Desist Order. Section 25-8-401(3), C.R.S. The Division's burden to show that EPGM is discharging pollution is that of a preponderance of the evidence. Section 24-4-105(7), C.R.S.

3. The Division has charged EPGM with discharging pollutants through two separate point sources: the juncture of the El Paso Shaft and the Roosevelt Tunnel and the Roosevelt Tunnel portal. The Division has failed to prove that the zinc and manganese in the water coming out of the Roosevelt Tunnel portal has its origin in the El Paso Mine owned by EPGM. Reliable measuring devices to determine the flow of water in the Roosevelt Tunnel have not been used. This, along with the dramatic drop in zinc and manganese concentrations from the El Paso Shaft to the portal, casts sufficient doubt on whether any of the zinc and manganese tested at the portal is coming from the El Paso Mine.

4. However, the Division has proved that EPGM is discharging pollutants at the bottom of the El Paso Shaft. It is more likely than not that some of the zinc and manganese in the water at this location has its source in the mine workings of the El Paso Mine. The law does not exempt a minimum amount of pollution; any amount of pollutant is sufficient for the "discharge of pollutants." Section 25-8-103(3), C.R.S.

5. The El Paso Shaft is a point source as defined by Section 25-8-103(14), C.R.S.

6. The water in the Roosevelt Tunnel is "state waters" as defined in Section 25-8-104(19), C.R.S." That definition includes: "any and all surface and subsurface waters which are contained in or flow in or through this state." This definition applies to water in the Roosevelt Tunnel.

7. Section 25-8-501 provides that "no person shall discharge any pollutant into any state water from a point source without first having obtained a permit from the division for such discharge."

8. EPGM is a corporation: a person as defined in Section 25-8-103(13), C.R.S.

9. Zinc and manganese are pollutants as defined by Section 25-8-103(15), C.R.S.

10. EPGM does not have permit issued by the Division to discharge pollutants at the point source of the bottom of the El Paso Shaft.

11. "Discharge of pollutants" means the introduction or addition of a pollutant into state waters, Section 25-8-103(3), C.R.S.

12. As stated in the ALJ's December 30, 2002 order regarding the motions for summary judgment, the ALJ rejects EPGM's argument that the "introduction or addition of a pollutant" is, on its face, inapplicable to passive landowners such as itself. The language is simply ambiguous. *Froebel v. Meyer,* 217 F.3d 928 (7th Cir. 2000), a federal case, is not controlling. True, the language could be clearer. Instead of the word "addition," the General Assembly could

have said "leaking," "escaping" or "leaching" as appears in the CERCLA language. 42 U.S.C. Section 9601(22). Yet, as pointed out by Magistrate Judge Coan in her opinion at page 25, the author of the language, whether Congress or Colorado's General Assembly, could also have more explicitly provided an *exemption* for passive landowners such as EPGM if it did not want to apply the prohibition on the "any addition of any pollutant" to such landowners,

13. *Northern Colorado Medical Center, Inc. v. Committee on Anticompetitive Conduct,* 914 P.2d 902 (Colo. 1996) provides at 907:

> Courts must give effect to the intent of the legislature by adopting the statutory construction that best effectuates the purposes underlying the legislative scheme. [Citations omitted.] In reviewing an agency's construction of a statute administered by that agency, courts must first consider whether the legislature has addressed the precise question at issue. [Citations omitted.] If the statute is silent or ambiguous with respect to the specific issue, courts must determine whether the agency's ruling on that issue is based on a permissible construction of the statute. [Citation omitted.] The interpretation of a statute by the agency charged with enforcement of that statute is generally entitled to deference. [Citations omitted.]

14. The purpose underlying the legislative scheme is expressed in the legislative declaration of the Colorado Water Quality Control Act at Section 25-8-102, C.R.S. It is the policy of the state of Colorado to "achieve the maximum practical degree of water quality in the waters of the state consistent with the welfare of the state." Section 25-8-102(1), C.R.S. Also, it is the policy of the state that "no

pollutant be released into any state waters without first receiving the treatment or other corrective action necessary to reasonably protect the legitimate and beneficial uses of such waters." Section 25-8-102(2), C.R.S. These expressions of the legislative scheme support the Division's view that even a passive landowner such as EPGM should be responsible for pollutants running out of its mine workings.

15. Section 25-8-102(5), C.R.S. provides that the water quality benefits of the pollution control measures should have a reasonable relationship to the economic impacts of such measures, and that "before any final action is taken, *with the exception of any enforcement action,* consideration be given to the economic reasonableness of the action." [Emphasis added.] This subsection would appear to give some support to EPGM. Enforcement against passive owners might lack a reasonable relationship to the economic impact of such measures. However, this subsection specifically exempts enforcement actions such as this. Economic reasonableness is not a defense in an enforcement action.

16. The evidence of the agency's interpretation of the applicability of the "introduction or addition of a pollutant" language to passive landowners appears in its June 24, 1987 Permit Policy of Mining Activities. Part B, dealing with inactive and abandoned mines provides that, generally, the Division will not actively pursue permitting of inactive or abandoned mines. However, on a case-by-case basis, the Division "may pursue remediation of significant water pollution problems from inactive/abandoned mines through either point or nonpoint source authority." The significance of this part B is that it shows the Division, as of 1987, believed it had the authority to pursue inactive

mines. That it generally would not do so except in cases of significant water pollution problems is only an expression of its prosecutorial discretion, it does not express a limit of its authority as it understood it. The Division held this opinion when the language "introduction or addition of a pollutant" was the same as it is now. This language was put in place in 1981. 1981 Colo. Sess. Laws 1311. The Division's interpretation as of 1987, as disclosed by its policy, is that the "introduction or addition of a pollutant" does not require active mining or land use.

17. EPGM argues that, of the examples of enforcement against inactive operators, it is only the case of New Cardinal, LLC that is analogous to its situation. The other permittees, Battle Mountain Gold Company and Sunnyside Gold Corporation, although currently inactive, had mined in the past. It was this past mining, according to EPGM, that was the active "introduction or addition of a pollutant." EPGM is correct that this is a significant distinction in the Division's *enforcement*. But this does not show that the Division interpreted the law as foreclosing enforcement against passive landowners. The Division's Policy makes no distinction between inactive mines where the owner once mined and where the owner did not.

The ALJ concludes that the Division has historically interpreted the language "introduction or addition of a pollutant" at Section 25-8-103(3), C.R.S. to apply to passive owners of mines. An agency's interpretation of the meaning of this ambiguous statute is entitled to weight. *Orsinger Outdoor Advertising, Inc. v. Department of Highways*, 752 P.2d 55, 66 (Colo. 1988). Relying on the legislative declaration at Section 25-8-102 and on the Division's interpretation, the ALJ concludes that passive landowners may be responsible for the "introduction or

addition of a pollutant" and may therefore be responsible for the discharge of any pollutant, in contravention of Section 25-8-501(1), C.R.S.

INITIAL DECISION

It is the Initial Decision of the ALJ that EPGM has discharged a pollutant into state waters from a point source, namely the base of the El Paso Shaft, without first having obtained a permit from the Division to do so, in contravention of Section 25-8-501, C.R.S.

DONE AND SIGNED

April 21, 2003

/s/ M. E. Norwood
MATTHEW E. NORWOOD
Administrative Law Judge

Exhibits admitted: 7, 8, 12, 12A, 12B, 15, 28, 29A, 38, 39, C, D, E, H, K, O, P, Q, T, Z, BB, HH, II, KK (paragraph 4 of the affidavit and attachments B and C only), PP, RR, TT, UU, UU1, UU2, YY, XX.

Offered but not admitted: 37, Y, JJ.

Withdrawn: 1, 2, 9, 13, 17, 18, N.

United States Court of Appeals,
Tenth Circuit.

SIERRA CLUB and Mineral Policy Center,
Plaintiffs-Appellees,

v.

EL PASO GOLD MINES, INC., Defendant-Appellant,
and Mountain States Legal Foundation, Amicus Curiae.

No. 03-1105.

ORDER

(Filed Oct. 21, 2005)

Before **MURPHY**, **McKAY**, and **TYMKOVICH**, Circuit Judges.

Appellees' petition for panel rehearing filed in this appeal is granted for the sole and limited purpose of correcting the dates when water samples were taken from the Roosevelt Tunnel portal. The relevant sentence (page 36) will now read:

Even the Plaintiffs' strongest evidence – that water samples at the shaft and the tunnel portal (samples taken by Cripple Creek & Victor Mining Co.) both contain zinc and manganese – is less than convincing given the uncertainties by which the data were collected.

The relevant footnote (footnote 8, page 36) will now read:

See supra note 2. The record contains only two water samples taken at the El Paso shaft. Although zinc and

manganese were detected, no samples link water from the El Paso shaft to water at the Roosevelt Tunnel portal.

In all other respects the petition for rehearing is denied.

The court now reissues a corrected version of the opinion, a copy of which is attached to this order.

Entered for the Court

/s/ Douglas E. Cressler
Clerk of the Court

33 U.S.C. § 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * *

33 U.S.C. § 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

* * *

33 U.S.C. § 1344. Permits for Dredged or Fill Material.

(a) Discharge into Navigable Waters at Specified Disposal Sites – The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

* * *

33 U.S.C. § 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

* * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * *

33 U.S.C. § 1365. Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf –

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.

No. 05-933

FILED
FEB 27 2006
OFFICE OF THE CLERK

In The Supreme Court of the United States

EL PASO PROPERTIES, INC.,

Petitioner,

v.

SIERRA CLUB and MINERAL POLICY CENTER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions framed by the Petitioner El Paso Properties, Inc., do not fairly state the basis for the decision of the Tenth U.S. Circuit Court of Appeals. The questions actually presented, fairly considering the Tenth Circuit's basis for its decision, are as follows:

1. Whether the owner of land upon which a man-made point source is situated that collects and conveys polluted water into a navigable river on an ongoing basis can be found liable under Section 402 of the Clean Water Act, despite the fact that the point source was actually constructed by a previous owner.

2. Whether the owner of property containing a man-made point source that collects and conveys polluted water into a navigable river on an ongoing basis can be in "continuous or intermittent violation" of the Clean Water Act [*Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 64 (1987)] for purposes of subject matter jurisdiction under Section 505(a) of the Act.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, there is no parent corporation or publicly held corporation that owns 10 percent or more of the stock of either the Sierra Club or Mineral Policy Center.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

On Sept. 4, 2001, Respondents Sierra Club and Mineral Policy Center sent a sixty-day notice letter pursuant to the Clean Water Act to El Paso Gold Mines, Inc., the previous name of Petitioner El Paso Properties, Inc., (hereinafter "El Paso" or "Petitioner"), regarding illegal discharges of mine pollution from the El Paso Shaft on its property through the Roosevelt Tunnel into Cripple Creek.

Reports from observers in the record here have described how polluted water on occasion "rains" down the El Paso Shaft into the Roosevelt Tunnel and the same flow discharges out the tunnel into Cripple Creek. Observers have documented in the record occasions where the primary source of the flow in the Tunnel comes from the El Paso Shaft. The Colorado Water Quality Control Division has reported that discharges from the Roosevelt Tunnel are "high in metals" and "[t]he concentrations of zinc in the discharge from the Roosevelt Tunnel have frequently and significantly, exceeded the limits that would be imposed in a permit to protect the water quality standard for zinc."

Today, more than four years after the sixty-day notice was sent, the Roosevelt Tunnel discharges remain unpermitted, and mine drainage continues to flow into Cripple Creek in this scenic Rocky Mountain area of Colorado, awaiting resolution of this case. In the record is an admission of El Paso that it has done nothing to reduce pollutant concentrations in the discharge from the Roosevelt Tunnel into Cripple Creek.

In the interim, El Paso has aggressively fought permitting in several ways: (1) by filing and pursuing a lawsuit pursued through the state courts in Colorado, (2)

by opposing a Notice of Violation/Cease and Desist Order issued by the state of Colorado through state administrative procedures, which have now been stayed at the election of the parties, and (3) by opposing this case in the U.S. District Court, the Tenth U.S. Circuit Court of Appeals and now in this Court.

El Paso fails to advise the Court that it established a new entity called Roosevelt Tunnel LLC that it proposed to be responsible for the discharges instead of itself, and sued the state of Colorado, and lost, when the state refused to go along with this plan. Roosevelt Tunnel LLC was a shell corporation with no assets or property ownership interests along the length of the El Paso Shaft or Roosevelt Tunnel. Even when a stay of the U.S. District Court order to apply for a discharge permit was denied in this case both by the district court and the Tenth Circuit, El Paso failed to obey the courts' orders.

On March 10, 2000, El Paso agreed to include its property within the external boundary of the active Cripple Creek and Victor cyanide heap leach gold mine nearby. In the case below, Sierra Club and Mineral Policy Center did not concede that El Paso's mine is "inactive." Active mining exploration, including drilling and waste rock sampling, has been performed on El Paso's property during its ownership. This mining activity was conducted by the Cripple Creek & Victor Gold Mining Company with the consent of El Paso. The case arrives at this Court not on a full record developed after trial of all the facts, but only on a limited summary judgment record.

The arguments that El Paso now brings to this Court, or variants thereof, are not accepted by the Colorado Water Quality Control Division or the U.S. Environmental

Protection Agency, and have been thoroughly briefed and rejected on five occasions by nine different judges: before a state administrative law judge (App. 77-79), before two Colorado state courts; before the U.S. District Court (App. 44-62), and before the Tenth U.S. Circuit Court of Appeals (App. 9-24). The Tenth Circuit's ruling actually favored the Petitioner on the question of whether material fact issues existed, not an issue here, in reversing summary judgment in favor of Sierra Club and the Mineral Policy Center. (App. 24-34).

Were this Court to grant certiorari the Court would only be delaying further the permitting of this mine drainage, allowing ongoing discharges all the while, in order to resolve questions based on a limited record that have been repeatedly briefed and resolved, and virtually all agencies, courts, judges and the parties, agree upon, with the exception of El Paso.

SUMMARY OF ARGUMENT

Petitioner attempts to frame the issue in this case as one of whether a property owner can be found liable under the Clean Water Act, ("CWA"), 33 U.S.C. § 1251 *et seq.*, based on the "mere ownership of property." Petition at ii. However, neither the district court, nor the Tenth U.S. Circuit Court of Appeals found Clean Water Act liability based on the "mere ownership of property."

Rather, both courts properly found that a person can be liable under the Clean Water Act for failing to obtain a valid National Pollutant Discharge Elimination System ("NPDES") permit under Section 402 of the Act, 33 U.S.C. § 1342, for ongoing and continuous discharges

of pollutants into navigable waters from man-made point sources (El Paso Shaft connecting to Roosevelt Tunnel) located on that person's property. Petitioner's characterization of this case as one in which it was found liable for the "mere ownership of property" wholly ignores the fact that both the pollutant-discharging El Paso Shaft and portions of the Roosevelt Tunnel are within Petitioner's property boundary. Thus, the courts below correctly and quite reasonably found that liability under the Clean Water Act stems from the discharge from the point sources located on Petitioner's property, not solely from Petitioner's ownership of the land.

The plain language of the Clean Water Act – when you read all of it, and harmonize the various parts, instead of just selected parts like the Petitioner – fully supports a finding of liability for the owner of property upon which a man-made point source discharges pollutants on an ongoing basis into navigable waters. The administrative agencies, to whom some deference is owed, interpret the statute that way.

There are no Constitutional issues to be resolved in this case. There is no split in the circuit courts on the issues presented with respect to liability under Section 402 of the Clean Water Act, as the Tenth Circuit itself discussed extensively, despite the inaccurate reading of the case law advanced by Petitioner.

Far from being a "new and expansive holding," with "great national significance" as Petitioner alleges, the finding of liability by the Tenth Circuit Court of Appeals is consistent with, and simply reaffirms, the plain language of the Clean Water Act and holdings of every federal court to address liability under Section 402. The Tenth Circuit's

decision also affirms the longstanding position of the U.S. Environmental Protection Agency ("EPA") and the State of Colorado Water Quality Control Division, the agencies with regulatory oversight of water quality, that "owners or operators" of points sources are subject to regulation. This Court should not upset the settled expectations of the public, the regulated industries, and these agencies by granting certiorari in this case and deciding these issues yet again.

Since the Clean Water Act discharge permitting requirement is triggered by ownership of a polluting point source, and not mere ownership of land, as the Tenth Circuit and district courts recognized, the statistics Petitioner cite about the number of abandoned mining sites located around the country are not meaningful concerning the potential effects of the Tenth Circuit's decision.

ARGUMENT

A. There Is No Split In The Circuits With Regard To The Elements Of Liability Under Section 402 Of The Clean Water Act, As The Tenth Circuit Correctly Found.

Petitioner's principal argument for this Court to grant certiorari in this case is that "the circuits are divided over the fundamental scope of the NPDES program." Petition at 9. However, Petitioner cannot demonstrate any such split in the circuits. In arguing that such a split exists, Petitioner cites to only one case, *Froebel v. Meyer*, 217 F.3d 928 (7thCir. 2000), *cert. denied*, 531 U.S. 1075 (2001), and contends that decision in *Froebel* is directly in conflict with

the Tenth Circuit's determination in this case. Petition at 11.

Contrary to Petitioner's claims, the Tenth Circuit's decision below and *Froebel* are not at odds, as the Tenth Circuit carefully considered this argument and found *Froebel* unpersuasive for three reasons and further distinguished *Froebel* on its facts. (App. at 21).

First, the Court held that *Froebel* interpreted Section 404 of the Clean Water Act, and not Section 402. (App. at 21). Section 402, the Tenth Circuit held, addresses the "discharge of any pollutant," whereas Section 404 addresses the "discharge of dredged or fill material." (App. at 21-22).

Second, the Court held Section 402 focuses on the point source and its ownership, while Section 404 emphasizes the "activity" giving rise to the discharge of dredged material, which further distinguishes the two sections. (App. at 22).

Finally, the Court held, the term "discharge of any pollutant" that appears in Section 402 must be understood as defined elsewhere in the Act, where the term "point source" is used to define "discharge" and give context to the term "addition" in the statute. (App. at 22-23). Thus, the Court concluded correctly that "if the point source is 'discharging,' the 'person' who owns or operates the point source is liable under the Act." (App. at 22).

Additionally, the Court noted that in *Froebel* the court held that the removed dam was not a point source. Here, by contrast, El Paso has conceded that its shaft is a point source. (App. at 22-23).

On these points, the Tenth Circuit ruling was thoughtful, reasonable and correct. Unlike Section 402, Section 404, applicable to the "discharge of dredged or fill material," 33 U.S.C. § 1344(a), clearly imposes an "activity" requirement as a condition of permitting. *See,* 33 U.S.C. § 1344(e)(1) (applies to categories of "activities") and 33 U.S.C. § 1344(f) (listing exempted "activities"). The same is true of the implementing regulations for Section 404. *See* 33 C.F.R. § 322.3 (listing "activities" requiring permits); 33 C.F.R. § 322.4 (listing "activities" not requiring permits); 33 C.F.R. § 323.2(f) (listing the type of "activities" included within the definition of "discharge of fill material"). Thus, the plain language of the CWA and its implementing regulations indicate that Section 402 and Section 404 permits are based on different triggering conditions.

The Tenth Circuit recognized that the term "discharge" broadly applies to both Section 402 and 404 of the Act. (App. at 21). However, an obvious explanation for the different statutory language in the two sections is that Section 404 was added to the original Clean Water Act bill as an amendment to preserve a pre-existing permit program of the Army Corps of Engineers. *See Kentuckians for the Commonwealth, Inc. v. Rivenburgh,* 204 F.Supp.2d 927, 933-35 (S.D.W.Va. 2002), *rev'd on other grounds,* 317 F.3d 425 (4thCir. 2003). Where an agency interpreting similar statutory terms differently provides a reasonable explanation for the difference, courts will uphold the construction. *National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs,* 260 F.3d 1365, 1379-80 (Fed.Cir. 2001).

Froebel also involves application of the CWA to dam structures, which raise the unique question whether

pollutants from dams were being added from the "outside world." *See National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6thCir. 1988); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C.Cir. 1982). This case, however, is not a "dam" case.[1]

Thus, in numerous respects, there is no conflict between the decision in this case and the Seventh Circuit's decision in *Froebel*, as the Tenth Circuit correctly found.

B. There Is No Statutory Or Regulatory Basis For A "Passive Landowner" Exemption To Clean Water Act Liability.

Petitioner argues further that "passive property owners" (i.e. those that own discharging point sources, but did not construct those sources) should be exempt from Clean Water Act liability. Petition at 10. However, there is

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[1] "In several policy statements made in opinion letters and reports to Congress in the 1970s and 1980s, the EPA took the position that dam releases should not be considered "discharges" under the CWA and thus NPDES permits would not be required for those releases. *See Gorsuch*, 693 F.2d at 167-69. This position was never formalized in a notice-and-comment rulemaking or formal adjudication under the Administrative Procedure Act, 5 U.S.C. §§ 553, 554, although the EPA subsequently reiterated its position in the *Gorsuch* and *Consumers Power* cases, as a defendant and amicus curiae, respectively. *See Consumers Power*, 862 F.2d at 583; *Gorsuch*, 693 F.2d at 165. Both courts rested their decisions on the conclusion that the EPA position deserved substantial deference and was reasonable. Given subsequent Supreme Court decisions governing judicial deference to federal agencies' constructions of the statutes that they implement, we hold that the EPA position is due less deference than that accorded it by the *Gorsuch* and *Consumers Power* courts."

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 489-490 (2dCir. 2001) (footnote omitted).

no basis for any such exemption in the Clean Water Act. Section 301 of the CWA states, "[e]xcept as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). Section 402 of the CWA, which establishes the NPDES permit system, provides that any discharge of any pollutants must be authorized by an NPDES permit. 33 U.S.C. § 1342. The term "discharge of pollutants" is defined as "***any*** addition of ***any*** pollutant to navigable waters from ***any*** point source." 33 U.S.C. § 1362(12) (emphasis added).

The requirement that all discharges covered by the CWA have an NPDES permit "is unconditional and absolute." *United States v. Tom-Kat Development, Inc.*, 614 F.Supp. 613, 614 (D.Alaska 1985). Importantly, the courts are consistent in their recognition that the CWA is a strict liability statute. *See United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10thCir. 1979).

Lacking support in the statute itself, Petitioner contends that "[e]very reported case imposing CWA permit liability has found that the discharge resulted from some affirmative conduct by the defendant." Petition at 11. However, Petitioner ignores the fact it has not found *a single case in which an "active conduct" or "mere landowner" defense has been sustained in a case under Section 402 of the CWA*. The Tenth Circuit correctly stated that: "[P]oint source owners such as El Paso can be liable for the discharge of pollutants occurring on their land, whether or not they acted in some way to cause the discharge." (App. at 23).

Furthermore, holding "owners or operators" liable under the Clean Water Act, rather than the person or persons who constructed a point source, is a very reasonable, common-sense approach. The person or persons who construct a point source but then sell the property generally no longer have access to the property in order to prevent further discharges or do the monitoring and control associated with the permitting process. Owners and operators, however, generally do have the necessary access and control. This would be especially true of any gravity-flow point source that requires no affirmative "operation," such as mine drainage tunnels which are commonplace in mining districts in the western United States. It is important to note that the term "point source" specifically includes the terms "tunnel" and "pipe" which are often gravity-flow conveyance systems requiring little or no operation after initial construction. 33 U.S.C. § 1362(14).

Additionally, it would not carry out the intent of the Clean Water Act to set up administrative agencies to undertake the difficult task of judging what is sufficient "activity" to require a person to obtain a permit, or having to defend lawsuits from polluters who say their "activity" was insufficient in this or that instance. It is well established that the CWA is not interpreted in such a way as to impose difficult administrative burdens on the regulatory agencies. *Costle v. Pacific Legal Foundation,* 445 U.S. 198, 215 (1980).

In contrast to Petitioner's claim, there is well-settled case law concluding that point source discharges of pollutants from mines must be authorized by an NPDES permit, even where the mining is inactive and the pollution is discharged from historic mining features. In *American*

Mining Congress v. U.S. EPA, 965 F.2d 759, 764 (9thCir. 1992) ("*AMC*"), the mining industry presented the same arguments currently being advanced by Petitioner against an EPA regulation requiring inactive mines to obtain NPDES permits for stormwater discharges – namely that the CWA does not impose NPDES permitting requirements on owners of inactive mines. The Ninth Circuit rejected these arguments and ruled that, "[a]ll point sources that discharge pollutants, including point sources that discharge pollutants from inactive mines, require a permit." *AMC*, 965 F.2d at 767.

In the Clean Water Act, Congress provided that effluent limitations "shall be applied to *all* point sources of discharges of pollutants in accordance with the provisions of this Act." 33 U.S.C. § 1311(e) (emphasis added). The statutory language used consistently throughout the CWA, as both the district court and Tenth Circuit recognized, demonstrates the intent of Congress that the point source permitting provisions apply to "owners or operators" of facilities and point sources. *See* 33 U.S.C. §§ 1311(c) ("owner or operator" of point sources employing best available technology); 1311(g)(2) and (3) ("owner or operator" of point sources with nonconventional pollutant control); 1311(i)(2)(A) ("owner or operator" of point sources where construction of publicly owned treatment works delayed); 1311(m)(1)(I) (dischargers to deep water territorial seas eligible for modification if "owner or operator" of comparable facility not put at competitive disadvantage); 1311(n) (alternative effluent limitations available to "owner or operator" of facility); 1312(b)(2)(B), (modifications of toxic pollutant limitations available within economic capability of "owner and operator of the source");

1317(e) (owner or operator of public treatment works may obtain extension for pretreatment standards); 1318(a) (record keeping requirements of "owner or operator of any point source") (App. at 19, 57-58). Thus, liability attaches to any "owner" of a point source from which discharges of pollution are ongoing.

Petitioner's argument is based solely on what it characterizes as the plain and ordinary meaning of the terms "discharge," "permit" and "addition." Petition at 16. However, this argument fails to account for other terms in the statute, including Congress' use of the term "any" to describe "addition" and the use of the terms "owners or operators" in various locations throughout the statute to refer to parties responsible for point source discharges.

It is a "cardinal rule" of statutory construction that "a statute is to be read as a whole." *Washington State Dep't of Social and Health Services v. Guardianship Estate of Keffeler,* 537 U.S. 371, 384, n.7 (2003). Petitioner's argument is based solely on its dubious characterization of three statutory terms taken out of context from other relevant terms in the same statute and its sensational but unfounded claims of harm to "passive landowners."[2]

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[2] The terms "discharge" and "any addition" do *not* by their plain meaning connote activity as Petitioner contends but more broadly apply regardless of any activity in creating the discharge. For example, as recognized in *Broderick Investment Co. v. Hartford Accident & Indemnity Co.*, 954 F.2d 601, 607, n.4 (10thCir. 1992), the term "discharge" is flexible enough in the context of pollution that it could have "many possible definitions." The dictionary defines "addition" to include not only the "act" of adding, but also the "process" of adding, and the term "process" has passive as well as active meanings. *Webster's Third New International Dictionary*, p.1808 (1961) (*e.g.*, definition b: "continued onward flow").

Petitioner also ignores EPA's statutory role of enacting regulations necessary to carry out the Act, 33 U.S.C. § 1361(a), and statutory control over NPDES permitting. 33 U.S.C. § 1342. In carrying out these functions, EPA more than two decades ago adopted regulations defining "discharge of pollutant" to include "additions of pollutants into waters of the United States from: . . . discharges through pipes, sewers, or other conveyances ***owned by a . . . person*** which do not lead to a treatment works." 40 C.F.R. § 122.2 (emphasis added); 44 Fed.Reg. 32854, 32901 (June 7, 1979). Moreover, the terms "facility or activity" mean "any NPDES 'point source' ***or*** any other facility ***or*** activity (***including land or appurtenances thereto***) that is subject to regulation under the NPDES program." 40 C.F.R. § 122.2 (emphasis added); 48 Fed.Reg. 14146, 14156 (April 1, 1983). The term "owner or operator" is also defined as "the ***owner or*** operator of any 'facility or activity' subject to regulation under the NPDES program."[3] 40 C.F.R. § 122.2 (emphasis added); 48 Fed.Reg. at 14156. *See also, Beartooth Alliance v. Crown Butte Mines*, 904 F.Supp. 1168, 1175 (D.Mont. 1995) ("*Beartooth*").

In interpreting the CWA, it is well established that EPA's interpretation of this "very complex statute" is entitled to "considerable deference." *Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985). EPA's regulations – adopted after public notice and comment – are "given controlling weight

[3] Since EPA's regulations apply in the Seventh Circuit as well as the Tenth, there is no basis for Petitioner's statement that: "If El Paso's property were located in the Seventh Circuit, it would not be required to obtain a NPDES permit under the circumstances of this case." Petition at 22.

unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

Petitioner also ignores the fact that the Clean Water Act is a strict liability statute. As such, equitable defenses are not relevant to a liability determination. *See State of Georgia v. City of East Ridge*, 949 F.Supp. 1571, 1579, n.7 (N.D.Ga. 1996) ("minimal adverse impact to the affected waters" is irrelevant); *Student Public Interest Research Group of New Jersey, Inc. v. P.D. Oil & Chemical Storage, Inc.*, 627 F.Supp. 1074, 1085 and 1090 (D.N.J. 1986) ("laches," "good faith" and "intent" of polluter are also irrelevant to the issue of liability); *United States v. Amoco Oil Co.*, 580 F.Supp. 1042, 1050 (W.D.Mo. 1984) ("good-faith" defense not available). Thus, Petitioner's attempted equitable arguments are not relevant to a judgment on liability, and instead are pertinent only to the issue of remedy (civil penalty and injunctive relief). *E.g.*, *Amoco*, 580 F.Supp. at 1050.

The so-called "innocent landowner" exemptions that Petitioner cites in other statutes involve exemptions from liability for pollution spills, not exemptions from a permitting process. Petition at 18.

Furthermore, exempting parties such as the Petitioner from any liability under the Act or even the requirement to obtain a permit would undermine the Act's ability to achieve its goal of eliminating the "discharge of pollutants into the navigable waters" of the United States. 33 U.S.C. § 1251. Petitioner itself admits that there are a multitude of inactive mine sites discharging pollution from

point sources into waters of the U.S. Should all these mine sites be exempt from the Act, it would all but guarantee that those affected water bodies would never meet water quality standards, as there would be no mechanism for ensuring their cleanup.[4]

Petitioner also mounts the unsupported argument that because it owned the point source prior to the enactment of the Clean Water Act, the Act should not apply to its property. Petition at 19. There is no support for the contention that the Clean Water Act was not intended to affect pre-existing polluting point sources. Congress clearly intended that point source discharges existing at the time the Act was passed be permitted. Under 33 U.S.C. § 1342(k), Congress provided a limited 180-day period after enactment of the CWA in which existing point source discharges would not be in violation if a permit application were filed. That opportunity for El Paso to avoid prosecution expired approximately three decades ago.

Lastly, Petitioner asserts that the Tenth Circuit's holding in this case will undermine Congressional efforts to enact "Good Samaritan" legislation aimed at encouraging clean up of abandoned mine sites. Petition at 21. This

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[4] Petitioner cites to federal government data portraying a large number of inactive mine sites with contaminated material that may "pose potential risks to human health . . . " Petition at 20. However, none of this data indicates the extent to which any of these mine sites are discharging pollution from point sources into navigable waters, the trigger for liability under the Clean Water Act. Without this specific information, there is no way to determine the relevance of the numbers of inactive mine sites cited by Petitioner. As such, these data fail to demonstrate any major impact associated with Petitioner being liable for discharges from a polluting point source located on its property.

argument is not only wholly speculative, but also represents a failure to understand the purpose of any such legislation. Indeed, the entire premise for such legislation is to give third parties who do not have an interest in the property containing a polluting mine site protection from liability for efforts to remedy ongoing discharges. In this way, these types of bills expressly recognize that Clean Water Act liability applies exactly as set forth by the Tenth Circuit.

Moreover, the specific legislation cited by Petitioner makes it clear that current owners of discharging point sources are not eligible for "Good Samaritan" status. This is because the purpose of this bill is not to provide an escape from liability for those who are already subject to this liability, but for those who would be willing to clean up the site but for that liability.

For Petitioner's role, it has taken no steps whatsoever to clean up the polluting discharge, despite having been found expressly liable by the district court in this case and by the State of Colorado in administrative proceedings. It strains credibility that Petitioner would somehow act to clean up the existing pollution if the "Good Samaritan" bill even passes, even though it would not do so under court order.

C. There Is No Exception To Clean Water Act Liability For Point Sources With Multiple Contributors, An Issue Which Was Not Raised Or Decided Below And Therefore Is Not Before This Court.

Petitioner argues that "the citizen suit is an inappropriate mechanism for adjudicating liability for alleged

point source discharges that have multiple sources." Petition at 8. Petitioner also argues that Sierra Club and Mineral Policy Center "have abused the citizen suit process" and exceeded the useful rule of "supplementing" government enforcement efforts under the Clean Water Act. Petition at 29-30.

First, these charges are incorrect. Sierra Club and Mineral Policy Center gave sixty day notice to El Paso and the government prior to commencing their action in U.S. District Court. Neither El Paso nor the government took any action to address the sixty day notice letter during the notice period. Thus, Sierra Club and Mineral Policy Center complied with all prerequisites for filing a citizen enforcement action. Neither government agency took any action against El Paso until years after this citizen enforcement action was commenced. Second, whatever their merits, these arguments were not raised and ruled upon by either the district court or the Tenth Circuit Court of Appeals, so they are not properly before this Court.

The only support for Petitioner's claim is that "the use of citizen suits may lead to inconsistent rulings in multiple administrative and judicial forums." Petition at 8. However, the current status of this case itself demonstrates the speculative nature of this assertion, as the very state administrative action to which Petitioner points to in support has been stayed, by agreement of all the parties including Petitioner, pending the resolution of this appeal. Since neither this case nor the state administrative case is final, it is quite a stretch to assert that the cases will reach inconsistent results.

Petitioner's position also fails to recognize the importance of citizen suits in the Clean Water Act's statutory scheme. In enacting the Clean Water Act, Congress granted jurisdiction to the United States district courts to hear citizen suits enforcing the requirements of the Act. 33 U.S.C. § 1365(a). Congress intended that citizen suits would serve "an integral part of [the Clean Water Act's] overall enforcement scheme." *Molokai Chamber of Commerce v. Kukui (Molokai), Inc.*, 891 F.Supp. 1389, 1402 (D.Haw. 1995). Congress also intended that Clean Water Act suits be "handled liberally, because they perform an important public function." *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1525 (9thCir. 1987). Here, Petitioner's arguments were not properly raised and decided and presented now for review; even if they were, its argument that citizen suits are "inappropriate" flies in the face of Congress' intent in expressly providing for such suits in the Clean Water Act. Notably, Petitioner fails to cite any authority, be it case law or otherwise, that supports an exemption from citizen suits in this context.

D. The Tenth Circuit Properly Applied This Court's Ruling In *Gwaltney v. Chesapeake Bay Foundation.*

Petitioner argues that jurisdiction in this case is improper because, as a matter of law, there can be no allegation of "a state of continuous or intermittent violation" of the Clean Water Act. Petition at 23. The sole fact cited in support of this argument is that the point sources in this case, the El Paso Shaft and Roosevelt Tunnel, were constructed wholly in the past. *Id.* at 28. However, this

position ignores the undisputed fact that the El Paso Shaft and Roosevelt Tunnel continue to collect and convey pollutants into navigable waters on an ongoing basis. It is this ongoing discharge from a point source that is the focus of the Clean Water Act liability in this case, not the fact that the conveyance structures were constructed in the past. The Tenth Circuit correctly focused on the key issue: "Thus, since plaintiffs have alleged the **contemporaneous discharge** from a point source – the El Paso shaft – which flows through other conveyances to navigable waters, CWA jurisdiction is established." (App. at 14) (emphasis added).

In proving an "ongoing" violation of the CWA, it is sufficient to show that there is a "reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57 (1987). "Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition." *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 693 (4thCir. 1989); *see also Committee to Save the Mokelumne River v. East Bay Mun. Util. Dist.*, 35 ERC 1537, 1551 (E.D.Cal. 1992). "[A] discharge of pollutants is ongoing if the pollutants continue to reach navigable waters, even if the discharger is no longer adding pollutants to the point source itself." *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F.Supp. 1312, 1322 (D.Ore. 1997); *see also Werlein v. United States*, 746 F.Supp. 887, 896-897 (D.Minn. 1990) (violations are "ongoing" when there is "toxic waste that has not yet reached a waterway, but is being introduced

into the waterway over time"). In *Beartooth,* also involving an inactive mine, the court "found evidence that violations were occurring at New World after the complaint was filed" and thus rejected the defendant's claim that the unpermitted discharges were "wholly past" violations. *Beartooth*, 904 F.Supp. at 1176. In support of its legal argument, Petitioner cites to several cases it had argued below where an "ongoing violation" was not found to have been alleged because the actual discharge had occurred wholly in the past, and all that remained to occur was the migration of that pollution to a navigable water. Petition at 25-27. The Tenth Circuit correctly distinguished these cases and rejected Petitioner's arguments, saying:

> "In contrast, this case does not involve the mere migration, decomposition, or diffusion of pollutants from an identifiable discharge that occurred sometime in the past. That the mine shaft itself is a point source is not reasonably contestable. Here, the discharge from the point source is occurring now, and is not the result of some past discharge that occurred on the surface of El Paso's property."

(App. at 13).

Petitioner cites "confusion" in the law on this point as a reason for this Court to grant certiorari, (Petition at 24), and the Tenth Circuit itself did recognize some potential disagreement in the cases. (App. at 10-12). However, regardless of which test used in the federal courts is applied, as the Tenth Circuit correctly held, there is *still* subject matter jurisdiction here under the *Gwaltney* test. Thus, this case is not a useful and appropriate one for this

Court to interpret any confusion that may allegedly exist in published cases.

CONCLUSION

This case is not the type of case this busy and important Court should select for review. Despite Petitioner's attempt to manufacture one, there is no split in the Circuit Courts. The Tenth Circuit's decision is squarely in line with precedent from numerous federal district and appellate courts across the country. Further, the decision comports with long-standing legal interpretations, and practical implementation, of the Clean Water Act by the U.S. EPA and state agencies.

When the Tenth Circuit's basis for its decision is fully and fairly considered, there is no "new and expansive" interpretation of the Act at issue. Petitioner's arguments have been considered by five separate decision-makers including nine separate judges and have been rejected each time. The case arrives here on only a limited summary judgment record. The alleged effect on large numbers of property owners is speculative at best because it ignores the basis of the Court's decision which limits its effects. Lastly, the decision fully and faithfully implements the intent of Congress in passing the Clean Water Act. Moreover, granting certiorari would only lead to further delays – beyond the four years of delay already – in properly permitting ongoing discharges at the site in contravention of the purpose of the Act.

Therefore, the Sierra Club and Mineral Policy Center respectfully request that Petitioner's Petition for Certiorari be denied in all respects.

Respectfully submitted,

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Dated this 27th day of February, 2006

(3)

No. 05-933

In The Supreme Court of the United States

EL PASO PROPERTIES, INC.,

Petitioner,

v.

SIERRA CLUB AND
MINERAL POLICY CENTER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF NORTHWEST MINING ASSOCIATION, COLORADO MINING ASSOCIATION, AND MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONER

COME NOW, Northwest Mining Association ("NWMA"), Colorado Mining Association ("CMA"), and Mountain States Legal Foundation ("MSLF") and hereby respectfully move, pursuant to Supreme Court Rule 37, for leave to file the accompanying *amici curiae* brief in support of Petitioner. Petitioner has granted consent to *amici* for the filing of the *amici* brief. However, Respondents denied consent because MSLF would not agree to allow Respondents to review the attached *amici curiae* brief prior to the filing thereof.

NWMA is a non-profit, non-partisan, trade association organized under the laws of the State of Washington, with its principal place of business in Spokane, Washington. NWMA was founded in 1895 by miners from the States of Idaho, Montana, and Washington, as well as several Canadian provinces. NWMA currently has 1,300 members residing in 31 States and 6 Canadian provinces. NWMA's purposes are: (1) to support and advance mineral resource and related industries; (2) to represent and inform members on technical, legislative, and regulatory issues; (3) to provide for the dissemination of educational material related to mining; and (4) to foster and promote economic opportunity and environmentally responsible mining.

CMA is the oldest mining trade association in the United States. Founded in 1876 and incorporated in 1897, CMA promotes the mining industry's interests before governmental agencies and the general public. Its membership includes more than 600 persons and organizations engaged in mineral exploration and development, as well as those who provide services to the mining industry,

including equipment manufacturers, bankers, law, consulting, engineering, and accounting firms. CMA's interest in this case is in defining the appropriate limits of Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, liability for mineral producers by ensuring that CWA liability is defined appropriately and consistently in §§ 402 and 404 of the CWA for the purpose of developing future mining projects.

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado, with its principal place of business in Lakewood, Colorado. MSLF is dedicated to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. The issue in this case is whether the CWA imposes liability on the owner of property for the unpermitted "discharge of a pollutant" when the owner did nothing more than simply own the property. Since its establishment in 1977, MSLF has been active in litigation aimed at ensuring the proper interpretation and application of the CWA. *E.g.*, *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) (*amicus curiae*); *Riverside Irrigation District v. Andrews*, 758 F.2d 508 (10th Cir. 1985) (represented intervenor); *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336 (2001) (represented plaintiff); *Rapanos v. United States*, Nos. 04-1034 and 04-1384 (2006) (*amicus curiae*). In addition, MSLF has over 5,000 members throughout the United States. Hundreds of these members own property in Colorado, Wyoming, Utah, New Mexico, Oklahoma, and Kansas.

The outcome of this case may have serious consequences for these members. Indeed, if the decision below is allowed to stand, all persons owning property within the

jurisdiction of the Tenth Circuit, including members of *amici*, may be subject to liability under the CWA for doing nothing more than owning a piece of property. *Amici* believe that the accompanying *Amici Curiae* Brief will assist this Court.

WHEREFORE, NWMA, CMA, and MSLF respectfully move for leave to participate in this case as *amici curiae* and to file the accompanying *Amici Curiae* Brief.

DATED this 27th day of February, 2006.

Respectfully submitted by:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Northwest Mining Association ("NWMA") is a non-profit, non-partisan, trade association organized under the laws of the State of Washington, with its principal place of business in Spokane, Washington. NWMA was founded in 1895 by miners from the States of Idaho, Montana, and Washington, as well as several Canadian provinces. NWMA currently has 1,300 members residing in 31 States and 6 Canadian provinces. NWMA's purposes are: (1) to support and advance mineral resource and related industries; (2) to represent and inform members on technical, legislative, and regulatory issues; (3) to provide for the dissemination of educational material related to mining; and (4) to foster and promote economic opportunity and environmentally responsible mining.

Colorado Mining Association ("CMA") is the oldest mining trade association in the United States. Founded in 1876 and incorporated in 1897, CMA promotes the mining industry's interests before governmental agencies and the general public. CMA membership includes more than 600 persons and organizations engaged in mineral exploration and development, as well as those who provide services to the mining industry, including equipment manufacturers, bankers, law, consulting, engineering and accounting firms. CMA's interest in this case is in

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[1] Petitioner has consented to the filing of this brief. Respondent did not consent, and a motion for permission to file this *amici curiae* brief precedes this brief.

In compliance with Supreme Court Rule 37(6), *amici curiae* represent that no counsel for any party authored this brief, in whole or in part, and that no person or entity, other than *amici curiae* and their members, made a monetary contribution for the preparation or submission of this brief.

defining the appropriate limits of Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, liability for mineral producers by ensuring that CWA liability is defined appropriately and consistently in Sections 402 and 404 of the CWA for the purpose of developing future mining projects.

Mountain States Legal Foundation ("MSLF") is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. Since its establishment in 1977, MSLF has been active in litigation aimed at ensuring the proper interpretation and application of the CWA. *E.g.*, *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) (*amicus curiae*); *Riverside Irrigation District v. Andrews*, 758 F.2d 508 (10th Cir. 1985) (represented intervenor); *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336 (2001) (represented plaintiff); *Rapanos v. United States*, Nos. 04-1034 and 04-1384 (2006) (*amicus curiae*). In addition, MSLF has over 5,000 members throughout the United States. Hundreds of these members own property in Colorado, Wyoming, Utah, New Mexico, Oklahoma, and Kansas.

The Tenth Circuit's decision may have serious consequences for members of these organizations. Indeed, if the Tenth Circuit's interpretation of the CWA is allowed to stand, all persons owning property within its jurisdiction, including members of NWMA, CMA, and MSLF, may be subject to liability under the CWA for doing nothing more than owning a piece of property. Because *amici* seek to ensure that the CWA is interpreted and administered in accordance with Congress's intent, they respectfully

submit this *Amici Curiae* Brief in support of Petitioner, El Paso Properties, Inc., urging the Court to grant the Petition for *Writ* of *Certiorari*.

SUMMARY OF ARGUMENT

The U.S. Supreme Court should grant the Petition for *Writ* of *Certiorari* for the following reasons. First, the Tenth Circuit violated this Court's well-established principles of statutory construction. Second, the Tenth Circuit's decision creates new liability for the federal government under the Clean Water Act.

REASONS FOR GRANTING THE PETITION

I. THE TENTH CIRCUIT FAILED TO FOLLOW ESTABLISHED SUPREME COURT PRECEDENT GOVERNING STATUTORY INTERPRETATION.

A. The Tenth Circuit Failed To Interpret The Clean Water Act According To The Legislative Purpose As Expressed By The Ordinary Meaning Of The Words Used.

Section 402 of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, establisnes a national pollutant discharge system ("NPDES") and directs the Environmental Protection Agency ("EPA") to issue NPDES permits for the "discharge of any pollutant." 33 U.S.C. § 1342(a)(1). Section 301 of the CWA makes it unlawful for "any person" to discharge a pollutant without a Section 402 permit. 33 U.S.C. § 1311(a) ("Except as in compliance with [Section 402], the discharge of any pollutant *by any person* shall be unlawful.") (emphasis added). Congress expressly defined

"discharge of a pollutant" as "any *addition* of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis added). Thus, pursuant to Congress's intent, the permit requirement in Section 402 is triggered only when: (1) a person; (2) adds; (3) a pollutant; (4) to navigable waters; (5) from a point source.

In interpreting a statute, a court must give effect to the intent of Congress. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982). The first place to look for that intent is the language of the statute itself. *Lewis v. U.S.*, 445 U.S. 55, 60 (1980). When looking at the language of the statute, a court must assume that the "legislative purpose is expressed by the *ordinary meaning* of the words used." *Richards v. United States*, 369 U.S. 1, 9 (1962) (emphasis added); *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning"). Applying these well-established principles of statutory construction to the statute in this case reveals that when Congress passed the CWA it intended to regulate only "active conduct" by a "person" that results in a "discharge of a pollutant."

The "ordinary meaning" of the word "addition" is "the *act* or *process* of adding." *The Merriam-Webster Dictionary* (1977) (emphasis added); *Webster's New Collegiate Dictionary* (1981). Thus, the "ordinary meaning" of the word "addition" indicates that some form of "active conduct" is required to trigger the permit requirement of Section 402.

It is undisputed that, in this case, Petitioner did not construct the mine or point source at issue. *See* Petitioner's Brief at 3. Petitioner has never conducted mining operations on this property and has never held a mining or

exploration permit. *Id.* Therefore, there is no active conduct on the part of Petitioner to satisfy the requirement of the word "addition" as intended by Congress in Section 402 of the CWA.

The Tenth Circuit ignored the requirements of the term "addition" when it found that, "[a]lthough we agree the term 'addition' implies affirmative conduct, such a requirement is satisfied by the *contemporaneous introduction* of polluted water from El Paso's property, through a point source owned and maintained by El Paso, to a navigable stream, Cripple Creek." *Sierra Club v. El Paso Gold Mines*, 421 F.3d 1133, 1144 (10th Cir. 2005) (emphasis added). This statement is a non sequitur; if one has never "added" then one has never "contemporaneously introduced." The Tenth Circuit cannot find a way around the requirement of an "addition" by simply choosing different terminology. This cannot be done specifically where the new terminology requires the same as the old. Both words require an affirmative act, as made clear by their plain meaning. The "ordinary meaning" of the word "addition" is "the *act* or *process* of adding." *Merriam-Webster*, *supra* (emphasis added). The "ordinary meaning" of the word "introduction" is "the *act* or *process* of introducing." *Id.* (emphasis added). The Tenth Circuit failed in concluding that an "addition" is satisfied by a "contemporaneous introduction" where Petitioner has never added or introduced anything into their property.

B. The Tenth Circuit Failed To Follow The Presumption That Identical Words Used In Different Parts Of The Same Statute Are Intended To Have The Same Meaning.

The conclusion that only "active conduct" triggers the permit requirement in Section 402 is supported by cases interpreting the language of Section 404. In *Froebel v. Myer*, 217 F.3d 928, 938-39 (7th Cir. 2000), *cert. denied*, 531 U.S. 1075 (2001), the Seventh Circuit held that "active conduct" is required to trigger the permit requirement in Section 404. In that case, the plaintiff brought a citizen suit, under Section 404, against both the State of Wisconsin and Waukesha County, Wisconsin, after the State had removed a dam from the Oconomowoc River. *Id.* at 930-31. The plaintiff alleged that the removal of the dam effectuated an unpermitted "discharge of dredged or fill material" because water passing through the opening where the dam was located was "scouring" the sediment from the bottom of the river and depositing that sediment downstream. *Id.* at 938. Although the County had not participated in the dam removal, the plaintiff sought to establish liability against the County based on the County's ownership of the property where the dam was located and where the "scouring" took place. *Id.* at 932.

In rejecting the plaintiff's attempt to impose liability on a passive property owner, the Seventh Circuit recognized that the terms "addition" and "redeposit," in the definitions of "discharge of dredged material" and "discharge of fill material," "strongly suggest that a Section 404 permit is required only when the party allegedly needing a permit *takes some action*, rather than doing nothing whatsoever [. . .]" *Id.* at 938 (emphasis added). As a result, the Seventh Circuit ruled:

> Section 404, its underlying regulations, and cases applying its terms all have a common element that is lacking in [the plaintiffs] claims against Waukesha County – *active conduct* that results in the discharge of dredged or fill material. If the county were to pile silt on the riverbank and deliberately allow rainfall to wash it into the stream, then Section 404 might become relevant. Here, however, [the plaintiff's] claim would essentially require Waukesha County to seek a permit to do nothing but continue to own the land. As even [the plaintiff] conceded at oral argument, that cannot be a correct interpretation of Section 404.

Id. at 939 (emphasis added).

If the term "discharge" in Section 404 requires "active conduct," then that term must be given the same meaning in Section 402 because the same word ("addition") is used to define "discharge" in both sections. The Tenth Circuit failed to follow U.S. Supreme Court precedent when it refused to consistently interpret identical language in Sections 402 and 404 of the CWA. "[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932); *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934); *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *Cohen v. de la Cruz*, 523 U.S. 213, 220 (1998). Thus, the Tenth Circuit should have held that Section 402 and 404 both require "active conduct" to trigger the permit requirements.

The conclusion that only "active conduct" triggers the permit requirement in Section 402 is also supported by Section 404 of the CWA. Section 402 provides that "the

Administrator may [. . .], issue a permit for the *discharge* of any pollutant [. . .]." 33 U.S.C. § 1342(a)(1) (emphasis added). Section 404 provides that "[t]he Secretary may issue permits, [. . .] for the *discharge* of dredged or fill material into the navigable waters [. . .]." 33 U.S.C. § 1344 (emphasis added).

To aid in interpretation of the CWA, Congress added CWA, Section 502, and defined "discharge," "pollutant," and "discharge of a pollutant." 33 U.S.C. § 1362(16), (6), and (12).[2] From reading Section 502, it is clear that both Sections 402 and 404 define "discharge" as "discharge of a pollutant" since "discharge" is used without qualification in both sections. Furthermore, it is clear that "discharge of a pollutant" in Sections 402 and 404 requires the "addition" of a pollutant, as per Section 502. However, the CWA does not define "addition" and its legislative history is silent on the meaning of this term. *See National Wildlife Federation v. Gorsuch*, 693 F.2d, 156, 175 (D.C. Cir. 1982); *Catskill Mts. Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 493 (2nd Cir. 2001).

The presumption that similar terms in the same statute must be given the same meaning is subject to the

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[2] "The term 'discharge' when used without qualification includes a discharge of a pollutant, and discharge of pollutants." 33 U.S.C. § 1362(16).

"The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

"The term "discharge of a pollutant" [. . .] means any addition of any pollutant to navigable waters from any point source [. . .]." 33 U.S.C. § 1362(12).

exception that similar terms in the same statute may be given different meanings if congressional intent is evident. *Atlantic Cleaners & Dyers, Inc. v. United States*, at 433 ("But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent."), Sections 402 and 404 have similar intents, *i.e.*, to prevent the unpermitted pollution of the nation's water. Furthermore, Sections 402 and 404 share the same definitional section, Section 502. Given these well-established canons of statutory construction, the terms in Sections 402 and 404 should be interpreted consistently.

II. THE TENTH CIRCUIT DECISION CREATES NEW LIABILITY FOR THE FEDERAL GOVERNMENT UNDER THE CLEAN WATER ACT.

A. The Federal Government Owns Property Containing Thousands Of Abandoned Mines Now In Violation Of Section 402 Of The Clean Water Act.

This case merits review by this Court because the outcome affects owners of thousands of abandoned mining sites, including the federal government. CWA liability is triggered where there is a discharge of any pollutant from a point source by any person unless authorized by permit. 33 U.S.C. § 1342. Although the federal government is a passive property owner, not engaged in any affirmative conduct to cause an addition of pollutants to navigable waters, under the Tenth Circuit's interpretation of the CWA, the federal government will be liable for its mere ownership of land.

For purposes of CWA Section 402 liability, "Person" is defined as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body." 33 U.S.C. § 1362(5). Although the federal government is not included on the face of the definition for "Person," the Ninth Circuit Court of Appeals has found criminal liability under the CWA for a federal employee acting within the course and scope of his employment. *United States v. Curtis*, 988 F.2d 946, 949 (9th Cir. 1993). Similarly, the U.S. Supreme Court has found federal civil liability under the CWA and induced federal agencies to comply with court-ordered injunctions to remedy CWA violations. *See United States Dep't of Energy v. Ohio*, 503 U.S. 607, 617-18, 628 (1992) (interpreting 33 U.S.C. § 1323(a) (noting express waiver of sovereign immunity)); *see also City of Jacksonville v. U.S. Dept. of Navy*, 348 F.3d 1307, 1314 (11th Cir. 2003) (holding that a waiver of sovereign immunity for punitive, as opposed to coercive, fines must be "unequivocally expressed in the statutory text").

If the Tenth Circuit's decision is allowed to stand, federal government liability and the concomitant taxpayer expense will be massive. No comprehensive list of abandoned mine sites on federal lands exists. However, a number of government agencies have completed surveys or estimated the number of abandoned mines in existence on federal lands, those abandoned mines on federal lands posing environmental threats, and the cost of cleaning up abandoned mines on federal lands.

In April 1988, the U.S. General Accounting Office ("GAO") estimated that 424,049 acres of federal land were covered by unreclaimed hardrock mines. U.S. Gen. Accounting Office, *Federal Land Management: An*

Assessment of Hardrock Mining Damage, Rep. No. GAO/RCED-88-123-BR at 6 (1988) ("GAO 1988 Report"). Of this total, the GAO estimated that 196,612 acres were abandoned mining operations. *Id.*

The Bureau of Land Management ("BLM"), an agency within the U.S. Department of the Interior ("DOI"), has management responsibility for the greatest number of abandoned mines on federal property. BLM is responsible for 260 million acres of land in the western States with 90 percent of that land being open to hardrock mining. National Research Council, Commission on Geosciences, Environment and Resources, *Hardrock Mining on Federal Lands* 1 (1999). In 1999, BLM estimated that it had from 70,000 to 300,000 abandoned mine sites on its property within fifteen western States. U.S. General Accounting Office, *Superfund: Progress Made by EPA and Other Federal Agencies to Resolve Program Management Issues*, Rep. No. GAO/RCED-99-111 at 36 (1999) ("GAO 1999 Report").

Although the BLM is charged with management of lands containing the largest concentration of abandoned mines on federal lands, a number of other federal agencies are faced with a similar situation. For example, the National Park Service, an agency within the DOI, inventoried approximately 2,500 abandoned mine sites on lands it managed. U.S. General Accounting Office, *Federal Land Management: Information on Efforts to Inventory Abandoned Hard Rock Mines*, Rep. No. GAO/RCED-96-30 at 4 (1996) ("GAO 1996 Report"). The Forest Service has identified approximately 39,000 abandoned mine sites on Forest Service lands. GAO 1999 Report at 30. The Fish and Wildlife Service determined that 240 abandoned mine sites are found in the agency's wildlife refuges. *Id.*

Finally, in response to a Congressional request for information about sites containing hazardous materials on the lands managed by the DOI, the U.S. Geological Survey estimated that approximately 88,000 abandoned mine sites, as of July 1994, could be found on lands managed by agencies within the DOI. GAO 1996 Report at 5. Although the surveying techniques among the agencies and even intra-agency vary greatly, clearly several thousand abandoned mine sites are located on federal lands.

Of these abandoned mine sites on federal lands, many have been identified as posing significant environmental risks. These sites would be directly impacted by the decision in this case. For example, the BLM estimated that of the 70,000-300,000 abandoned mine sites on BLM property, approximately 4-13 percent, or 2,800-39,000, may pose potential risks to human health and the environment. GAO 1999 Report at 36. The Forest Service estimated that approximately 5 percent, or 1,800, of the abandoned mines on its property could be releasing hazardous substances. *Id.* at 30. Although these numbers are estimates, given the large numbers of abandoned mine sites located on lands managed by federal agencies, even a small percentage equates to several thousand sites posing significant risk.

If the Tenth Circuit's holding is allowed to stand, the federal government will potentially have CWA point source liability since it owns the leaky "faucets" and is responsible for its "drips." *Sierra Club v. El Paso Gold Mines*, 421 F.3d 1133, 1145 (10th Cir. 2005). This financial responsibility would be staggering. The Forest Service has estimated a cost of $4.7 billion to reclaim abandoned mine sites on lands within National Forest boundaries. GAO 1996 Report at 9. Of this amount, $2.5 billion would be used to

restore natural resources at 2,500 abandoned mine sites and $2.2 billion would be used to restore water quality and address safety problems at another 22,500 sites. *Id.* Although Congress may conclude that federal agencies have an obligation to reclaim these lands, that conclusion should be made by Congress and not by the Tenth Circuit defining the CWA contrary to Congressional intent.

The DOI has reclaimed 20,000 acres of abandoned mine sites at a cost of $5,000 per acre. *Id.* at 10. In a 1991 report, the DOI used this experience to estimate a cost of $11 billion to reclaim existing abandoned mine sites on federal lands. *Id.* at 10. In a 1996 report, the GAO reported a "worst-case" cost of $4 billion to $35.3 billion to reclaim abandoned mine sites on federal lands. *Id.* at 10. Although these numbers are estimates and better data are needed for a final calculation, based on the vast number of abandoned mine sites and the known dollar amount per acre required for remediation, the cleanup will cost billions of dollars.

B. The Federal Government Is Now Subject To Massive Financial Liability Through Clean Water Act Citizen Suits.

In addition to this new CWA responsibility to ensure that federal agencies, as passive property owners, are not "discharging" any pollutant from a point source without a permit, federal agencies are now open to new and expensive litigation under the citizen suit provision of the CWA. 33 U.S.C. § 1365. The citizen suit provision allows any citizen to commence a civil action for violation of the CWA against "any person," specifically including "(i) the United States, and (ii) any other governmental instrumentality or

agency to the extent permitted by the eleventh amendment to the Constitution." 33 U.S.C. § 1365(a)(1). The federal government is now subject to thousands of additional citizen suits and will be forced to bear not only its own litigation costs, but the costs of litigation, attorney and expert witness fees "to any prevailing or substantially prevailing party, whenever the court determines such an award appropriate." 33 U.S.C. § 1365(d).

CONCLUSION

If the decision of the Tenth Circuit is allowed to stand, the federal government will be funding the litigation arm of numerous environmental groups. In effect, the Tenth Circuit decision creates a perpetual motion machine for environmental groups. These groups will use the fee awards from one suit to challenge the next abandoned mine on federal land as they move from mine to mine on lands governed by the Tenth Circuit's decision.

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